105

(1)

Supreme Court, U.S.
FILED

08-319 SEP 4 - 2008

Case No.:_____ OFFICE OF THE CLERK

# In the Supreme Court of the United States

HARENDA ENTERPRISES, INC.,

*Petitioner,*

v.

STATE OF WISCONSIN,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

## PETITION FOR WRIT OF CERTIORARI

MARK W. RATTAN
*Counsel of Record*
LITCHFIELD CAVO, LLP
13400 BISHOPS LANE, SUITE 290
BROOKFIELD, WI 53005
(262) 784-8966
ATTORNEY FOR PETITIONER

LEGAL PRINTERS, Washington DC • 202-747-2400 • legalprinters.com

## QUESTIONS PRESENTED FOR REVIEW

### Introductory Statement

Petitioner, Harenda Enterprises, Inc. (HEI), is one of many firms across the United States that investigates buildings to determine whether they contain a level of asbestos that must be abated prior to renovation. In a 4-3 decision, the Supreme Court of Wisconsin held HEI liable for asbestos abatement violations pursuant to a long-held policy of the federal Environmental Protection Agency (EPA) *that was never enacted by legal administrative rulemaking under the federal Administrative Procedure Act (APA)*, and that is inconsistent with the asbestos abatement regulation that the EPA did legally enact under the APA. Effectively, the Wisconsin decision also holds that, when the defendant's test results for asbestos are negative and government's test results are positive, the government's positive test results are presumptively valid and the defendant's negative test results are presumptively invalid. The effect of the decision is to vastly increase the social and economic cost of asbestos abatement and to impose a presumption of guilt on a defendant accused of violating asbestos abatement regulations.

### Questions Presented For Review

**Issue 1:**

Can two publications unilaterally handed-down by the EPA without observance of legally required administrative rulemaking -- the effect of

which dramatically increases the social and economic cost of asbestos abatement and increases the criminal and civil liability of owners and operators of building renovations -- be given the force of law by the courts and thereby serve as the basis for imposition of criminal and civil liability under other properly enacted asbestos abatement regulations?

**Issue 2:**

Did the Supreme Court of Wisconsin violate HEI's substantive due process rights under the 14th Amendment to the U.S. Constitution by holding HEI liable for asbestos abatement violations on a presumption of guilt under circumstances where the defendant's test results for asbestos are negative and the government's tests for asbestos are positive?

**Issue 3:**

If, as the State contended in the lower courts, and as the Supreme Court of Wisconsin held, the asbestos abatement regulation that the EPA did pass through legal administrative rulemaking is vague, confusing and unclearly written, the issue becomes whether the regulation is void for vagueness under the 14th Amendment to the U.S. Constitution.

## PARTIES TO THE PROCEEDING

The parties to this petition are as indicated on the caption.

Petitioner is Harenda Enterprises, Inc., and respondent is the State of Wisconsin.

Harenda Enterprises, Inc. has no parent corporations, and there is no corporation that owns 10% or more of Harenda Enterprises, Inc.'s stock.

## TABLE OF CONTENTS


| SECTION TITLE | Page No. |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| Introductory Statement . . . . . | i |
| Questions Presented For Review . . . . . | i |
| PARTIES TO THE PROCEEDING . . . . . | iii |
| TABLE OF CONTENTS. . . . . | iv |
| CITATIONS OF OFFICIAL REPORTS . . . | 1 |
| STATEMENT OF THE BASIS FOR JURISDICTION . . . . . | 2 |
| CONSTITUTIONAL PROVISIONS, TREATIES AND ORDINANCES INVOLVED IN THE CASE . . . . . | 3 |
| STATEMENT OF THE CASE . . . . . | 4 |
| I. NATURE OF THE CASE . . . . . | 4 |
| II. NATURE OF THE FEDERAL ISSUES INVOLVED IN THE CASE | 7 |
| A. The Federal Issue Concerning The Supreme Court Of Wisconsin Having Validated The EPA's Illegal Attempt | |

| SECTION TITLE | | | Page No. |
|---|---|---|---|
| | | To Pass Substantive Regulations Without Observing Administrative Procedure Act Rulemaking . . . | 7 |
| | 1. | Background: The Legally Passed Regulations Under The NESHAP And The Interim Method . . . . . | 7 |
| | 2. | The Federal Issue Regarding The EPA's Illegal Attempt To Effect A Substantive Change To The Interim Method By Administrative Fiat . . . | 10 |
| B. | | The Federal Issue Concerning The Violation Of HEI's Substantive Due Process Rights . . . . . | 16 |
| C. | | The Federal Issue Concerning The Interim Method Being Void For Vagueness . . . . . | 18 |
| II. | | STAGE OF THE PROCEEDINGS IN THE LOWER COURTS WHEN THE FEDERAL QUESTIONS WERE RAISED . . . . . | 19 |

| SECTION TITLE | Page No. |
|---|---|
| RULE 14(h): REASONS WHY THE WRIT SHOULD BE GRANTED . . . . . | 22 |
| I. THIS COURT SHOULD GRANT CERTIORARI UNDER RULE 10(c) BECAUSE THE SUPREME COURT OF WISCONSIN HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT . . . | 22 |
| A. This Court Should Settle The Federal Question Concerning The Single Layer v. Combined Layer Testing Method Because The EPA's Illegal Rule Significantly Increases The Economic And Social Cost Of Asbestos Abatement Nationally . . . . . | 22 |
| B. This Court Should Settle The Federal Question Concerning The Single Layer v. Combined Layer Testing Method Because The Supreme Court Of Wisconsin's Decision Increases Potential Asbestos Liability In Building Renovations . . . . . | 25 |
| II. THIS COURT SHOULD GRANT CERTIORARI UNDER RULE 10(b) | |

| SECTION TITLE | | Page No. |
|---|---|---|
| | BECAUSE THE INCONSISTENT DECISIONS BY THE LOWER COURTS WARRANT THAT THE FEDERAL ISSUE CONCERNING SINGLE LAYER VERSUS COMBINED LAYER TESTING BE SETTLED BY THIS COURT . . . . . | 26 |
| III. | THIS COURT SHOULD GRANT CERTIORARI ON THE SUBSTANTIVE DUE PROCESS ISSUE UNDER RULE 10(c) BECAUSE IT HAS NATIONAL IMPLICATIONS FOR THE COST OF ASBESTOS ABATEMENT LIABILITY . . . . . | 29 |
| A. | This Court Should Settle The Substantive Due Process Issue Concerning Whether The State's Positive Test Results Are Presumptively Valid And The Defendant's Negative Test Results Are Presumptively Invalid . . . . . | 29 |
| B. | This Court Should Settle The Substantive Due Process Issue Concerning Whether Liability For Asbestos Abatement Violations Must Be Based Upon Representative Samples . . . . . | 32 |

APPENDICES


| Document No. | Page No. |
|---|---|
| Document No. 1: *State of Wisconsin v. Harenda Enterprises, Inc.*, 2008 WI 16, ___ Wis. 2d ___, 746 N.W.2d 25 (Wis. 2008) | A-1 |
| Document No. 2: *State of Wisconsin v. Harenda Enterprises, Inc.*, 2006 WI App 230, 297 Wis. 2d 571, 724 N.W.2d 434 (Wis. Ct. App. 2006) | A-57 |
| Document No. 3: Order of the Supreme Court of Wisconsin Denying Rehearing, June 11, 2008 | A-70 |
| Document No. 4: 28 U.S.C. §1257 | A-73 |
| Document No. 5: National Emission Standards For Hazardous Air Pollutants (NESHAP), 40 CFR §61.140, *et. seq.* | A-75 |
| Document No. 6: Interim Method of the Determination of Asbestos in Bulk Insulation Samples, appendix E, subpart E, 40 CFR part 763, section 1.7.2.1. | A-101 |
| Document No. 7: Clean Air Act, 42 U.S.C. §7412 | |

| Document No. | Page No. |
|---|---|
| Administrative Procedure Act (APA), 5 U.S.C. §553 | A-119 |
| Document No. 8: Administrative Procedure Act, 5 U.S.C. §553 | A-121 |
| Document No. 9: NR 447.04(28), Wisconsin Administrative Code | A-124 |
| Document No. 10: NR 447.01-.02; NR 447.06-.08; NR 447.13, Wisconsin Administrative Code | A-126 |
| Document No. 11: Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems, Federal Register, Vol. 59, No. 3, January 5, 1994 | A-154 |
| Document No. 12: Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems, Federal Register, Vol. 60, pp. 65243-44, December 19, 1995 | A-159 |
| Document No. 13: *United States v. San Diego Gas & Electric Company*, 2006 WL 391 3457 (Nov. 21, 2006) ("San Diego Gas I") | A-166 |

| Document No. | Page No. |
|---|---|
| Document No. 14: Trial Court Stipulation . . . . . | A-196 |
| Document No.15: Order Concerning Summary Judgment Motions, Other Motions And Scheduling . . | A-202 |
| Document No. 16: Trial Court Order Denying Motion In Limine . . . . . | A-207 |
| Document No.17: Findings Of Fact And Conclusions Of Law | A-210 |
| Document No. 18: Final Judgment In Favor Of The State Of Wisconsin . . . . . | A-226 |
| Document No. 19: EPA "Notice", 59 Fed. Reg. 38970 (August 1, 1994) . . . . . | A-230 |
| Document No. 20: Wis. Stat. §285.87(1) . . . . . | A-237 |
| Document No. 21: 42 U.S.C. §7413(b) . . . . . | A-239 |
| Document No. 22: *United States v. San Diego Gas & Electric Company*, 2007 WL 4326773 (December 7, 2007) ( "*San Diego Gas II*") . . . . . | A-248 |

| Document No. | Page No. |
| --- | --- |
| Document No. 23: Asbestos-Containing Materials in School Buildings: A Guidance Document ("Reference 5") . . . . . | A-277 |

## TABLE OF CITED AUTHORITIES


| Cited Authority | Page No. |
|---|---|
| **Cases** | |
| *State of Wisconsin v. Harenda Enterprises, Inc.*, 2008 WI 16, ___ Wis. 2d ___, 746 N.W.2d 25 (Wis. 2008) [Appx., Doc. 1] | 1 |
| *State of Wisconsin v. Harenda Enterprises, Inc.*, 2006 WI App 230, 297 Wis. 2d 571, 724 N.W.2d 434 (Wis. Ct. App. 2006) [Appx., Doc. 2] | 1 |
| *United States v. San Diego Gas & Electric Company*, 2006 WL 391 3457 (Nov. 21, 2006) ("*San Diego Gas I*") [Appx., Doc. 13] | 13, 16, 21, 23, 26-28 |
| *United States v. San Diego Gas & Electric Company*, 2007 WL 4326773 (December 7, 2007) ("*San Diego Gas II*") [Appx., Doc. 22] | 33, 35-38 |
| *Women's Medical Center of Northwest Houston v. Bell*, 248 F. 3d 411 (5th Cir. 2001) | 19 |
| **Constitutional Provisions** | |
| 14th Amendment to U.S. Constitution | 3, 17, 19 |
| **Statutes** | |
| 28 U.S.C. §1257 [Appx., Doc. 4] | 2 |

| Cited Authority | Page No. |
|---|---|
| Administrative Procedure Act, 5 U.S.C. §553 [Appx., Doc. 8] | 7 |
| Clean Air Act, 42 U.S.C. §7412 [Appx., Doc. 7] | 7 |
| Clean Air Act, 42 U.S.C. §7413(b) [Appx., Doc. 21] | 25 |
| Wis. Stat. §285.87(1) [Appx., Doc. 20] | 25 |
| **Regulations** | |
| Asbestos-Containing Materials in School Buildings: A Guidance Document ("Reference 5") [Appx., Doc. 23] | 18, 33-34, 36 |
| Interim Method of the Determination of Asbestos in Bulk Insulation Samples, appendix E, subpart E, 40 CFR part 763, section 1.7.2.1. [Appx., Doc. 6] | 7, 8-16, 18-23, 26-28, 33-35, 38 |
| National Emission Standards For Hazardous Air Pollutants (NESHAP), 40 CFR §61.140, *et. seq.* [Appx., Doc. 5] | 7-8, 11-12, 16, 18, 20, 22, 25, 34, 36-38 |
| NR 447.04(28), Wisconsin Administrative Code [Appx., Doc. 9] | 9 |

| Cited Authority | Page No. |
|---|---|
| **Other - EPA Publications** | |
| Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems, Federal Register, Vol. 59, No. 3, January 5, 1994 [Appx., Doc. 11] | 11 |
| Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems, Federal Register, Vol. 60, pp. 65243-44, December 19, 1995 [Appx., Doc. 12] | 12 |
| EPA "Notice", 59 Fed. Reg. 38970 (August 1, 1994) [Appx., Doc. 19] | 22 |

## CITATIONS TO OFFICIAL REPORTS

The citation to the opinion of the Supreme Court of Wisconsin is *State of Wisconsin v. Harenda Enterprises, Inc.*, 2008 WI 16, ___ Wis. 2d ___, 746 N.W. 2d 25 (2008). [Appx., Doc. 1, pp. A-1 to A-56]

The citation to the Wisconsin Court of Appeals decision is *State of Wisconsin v. Harenda Enterprises, Inc.*, 2006 WI App 230, 297 Wis. 2d 571, 724 N.W.2d 434 (Ct. App. 2006). [Appx., Doc. 2, pp. A-57 to A-59]

## STATEMENT OF THE BASIS FOR JURISDICTION

The date of the judgment sought to be reviewed is a decision of the Supreme Court of Wisconsin dated March 13, 2008. [Appx., Doc. 1, pp. A-1 to A-56]

The date of the denial of rehearing is June 11, 2008. [Appx., Doc. 3, pp. 70-72]

The statutory provision that confers on this Court jurisdiction to review a petition for writ of certiorari the judgment in question is 28 U.S.C. §1257. [Appx., Doc. 4, pp. A-73 to A-74]

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND ORDINANCES INVOLVED IN THE CASE

This case involves the due process clause of the 14th Amendment to the U.S. Constitution, which provides in relevant part as follows.

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Per rule 14.1(f), the remaining provisions are too voluminous to reproduce here, and are accordingly reproduced in the Appendix. They are all cited in the Table of Contents above.

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE.

Respondent, the State of Wisconsin ("the State") filed this action against petitioner, Harenda Enterprises, Inc. (HEI), in the Circuit Court of Milwaukee County, Wisconsin on July 30, 2003 seeking recovery for HEI's alleged failure to comply with various asbestos abatement regulations in connection with the renovation of a building known as the Milwaukee Auditorium ("the Auditorium"). HEI is in the business of environmental, health and safety consulting and contracting. The Wisconsin Center District (WCD), a quasi-municipality that operates the Auditorium, retained HEI to render professional asbestos consulting services in connection with the renovation. HEI's primary role was to undertake sampling and testing of ceilings, walls and other components of the Auditorium to determine whether any components of the Auditorium contained asbestos that would have to be abated prior to renovation under applicable federal laws and regulations more fully described in the following section.

In sum and substance, the State contended in the lower courts that HEI failed to identify all of the asbestos in the Auditorium under the illegal testing protocols that the EPA never enacted through proper rulemaking. Because of HEI's alleged failure to identify all the asbestos, the State contended that various walls of the Auditorium that contained asbestos were demolished without observance of the asbestos abatement regulations. HEI's failure to

identify all of the asbestos subjected HEI to the forfeiture penalties imposed by the regulations, the State contended.

In a 4-3 decision, the Supreme Court of Wisconsin ruled for the State, and found HEI liable for asbestos abatement violations pursuant to the EPA's illegal testing protocols that were never enacted by legal administrative rulemaking under the APA. The Wisconsin decision is inconsistent with the testing protocols in the asbestos abatement regulation that the EPA did legally enact under the APA. Under this decision, when the defendant's test results are negative for asbestos and government's test results for asbestos are positive, the government's positive test results are presumptively valid and the defendant's negative test results are presumptively invalid.

If allowed to stand, the effect of the decision is two-fold. First, it subjects owners and operators of building renovations to criminal liability and millions of dollars in civil forfeiture penalties based upon (1) EPA policies concerning asbestos testing never enacted as rules, and (2) an illegal presumption of guilt in favor of the government and against the individual. Second, the Wisconsin decision vastly increases the economic and social cost of asbestos abatement in building renovations on a national basis, and vastly expands the jurisdiction of the EPA and the universe of material subject to regulation. In so doing, the decision imposes liability found nowhere in the law.

This Court has never addressed the federal issues raised in this appeal. These issues have only been addressed by the decisions of the Southern District of California, the Supreme Court of Wisconsin, and lower Wisconsin courts. As discussed, *infra*, the Southern District of California reached the exact opposite decision from the Supreme Court of Wisconsin.

Because of the inconsistent federal-state decisions, the national implications of the Wisconsin decision on the cost of asbestos abatement, and the civil and criminal liability the decision imposes on owners and operators of building renovations nationally, HEI seeks a writ of certiorari for this Court to reverse the decision of the Supreme Court of Wisconsin.

## II. NATURE OF THE FEDERAL ISSUES INVOLVED IN THE CASE.

### A. The Federal Issue Concerning The Supreme Court Of Wisconsin Having Validated The EPA's Illegal Attempt To Pass Substantive Regulations Without Observing Administrative Procedure Act Rulemaking.

#### 1. Background: The Legally Passed Regulations Under The NESHAP And The Interim Method.

The background of the initial federal question in this case concerns the asbestos testing protocols for building renovations that the EPA did legally enact under National Emission Standards For Hazardous Air Pollutants (NESHAP), 40 CFR §61.140, *et. seq*. [Appx., Doc. 5, pp. A-75 to A-100] The NESHAP's mandated method for testing for asbestos is the "Interim Method of the Determination of Asbestos in Bulk Insulation Samples" ("the Interim Method"), codified at appendix E, subpart E, 40 CFR part 763, section 1.7.2.1. [Appx., Doc. 6, pp. A-101 to A-118] The U.S. Environmental Protection Agency (EPA) passed the NESHAP per its authority under the Clean Air Act (CAA), 42 U.S.C. §7412 following valid administrative rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. §553 [Appx., Doc. 7, pp. A-119 to A-120; Appx., Doc. 8, pp. A-121 to A-123]

Under the NESHAP, the owner or operator of a building scheduled for renovation must undertake an investigation to determine whether the building contains what the NESHAP designates as "Asbestos Containing Material" (ACM). *See* 40 CFR §61.145(a). [Appx., Doc. 5, pp. A-84 to A-87] The investigation involves taking samples of walls, ceilings and other building material in accordance with sampling protocols in the Interim Method [Appx., Doc. 6, pp. A-102 to A-117] The samples are then tested for asbestos in a laboratory. Essentially, the testing protocols in the Interim Method require that a lab analyst determine the asbestos content of the samples by viewing them through a polarized light microscope and counting the asbestos fibers, a process known as "Polarized Light Microscopy."

The sample is considered ACM if the lab analyst determines that it contains "more than 1 percent asbestos as determined using the [polarized light microscopy] methods specified in [the Interim Method]." 40 CFR §61.141. [Appx., Doc. 5, p. A-78] If the analyst's estimate exceeds the 1% regulatory threshold, all "homogeneous areas" of the wall from which the sample was taken are considered as containing ACM. [R. 15: 943-48] If the ACM containing walls are to be demolished as part of a renovation, the ACM is considered "Regulated Asbestos Containing Material" (RACM), and becomes subject to the NESHAP's abatement requirements. 40 CFR §61.141. [Appx., Doc. 5, p. A-82]

The abatement requirements provide that the RACM cannot simply be demolished if, for example, walls with ACMs are to be removed as part of the renovation. Instead, the abatement requirements mandate that the walls with ACMs must be "adequately wetted," "carefully lowered," *etc.* prior to demolition. 40 CFR §61.145(c)(2)(i)-(ii). [Appx., Doc. 5, pp. A-93] In addition, the abatement requirements mandate that the EPA be notified of the planned renovation when the building contains RACM. 40 CFR §61.145(b).[1] [Appx., Doc. 5, p. A-87]

---

[1] The State actually brought the lawsuit under NR 447, Wisconsin Administrative Code. The State's claims under NR 447, however, do not affect the federal nature of the issue, because in NR 484.04(28) the State adopted the Interim Method. [Appx., Doc. 9, pp. A-124 to A-125] In addition, the State adopted the NESHAP verbatim with the exception of a few cosmetic, non-substantive changes. The provisions of NR 447 that the State asserted HEI violated are thus virtually identical to the NESHAP. *Compare* the violations the State alleged in NR 447.08(6) concerning "carefully lowering" and "adequately wetting" to virtually identical provisions in 40 CFR §61.145(c); the notice violations the State alleged in NR 447.07 to the virtually identical provisions in 40 CFR §61.145(b); *and* the prohibition against discharge of asbestos into outside air the State alleged in NR 447.13(1) to the virtually identical provisions in 40 CFR §61.150. [Appx., Doc. 10, pp. A-126 to A-153; Appx., Doc. 5, pp. A-75 to A-100] More important, the federal issue involves the promulgation and interpretation of the Interim Method, and both the NR 447 regulations and the NESHAP expressly adopt the Interim Method. *See* NR 447.02(1) *and* 40 CFR §61.141. [Appx., *Id.*] As discussed below, one of the major federal issues the lower courts addressed was whether the asbestos test results upon which the State relied to establish that the Auditorium contained ACM satisfied the Interim Method as adopted by 40 CFR §61.141 and NR 447.02(1).

## 2. The Federal Issue Regarding The EPA's Illegal Attempt To Effect A Substantive Change To The Interim Method By Administrative Fiat.

The dispute that raises the initial federal question in this case revolves around the required testing protocols under the Interim Method for the type of "layered" wall material that is frequently encountered in building renovations across the United States -- *i.e.*, wall material that, because of prior renovations, may contain a layer of plaster, a layer of stucco, a layer of dry wall, and perhaps multi-layers of paint -- where some of the layers may contain ACM and some may not. The Interim Method provides in Section 1.2.7.1. that each layer is tested for asbestos, and the results are combined to obtain an overall result for the entire sample, as follows.

> 1.7.2.1. Gross Examination
>
> Bulk samples of building materials taken for the identification and quantitation of asbestos are first examined for homogeneity at low magnification with the aid of a stereomicroscope. The core sample may be examined in its container or carefully removed from the container onto a glassine transfer paper or clean glass plate. If possible, note is made of the top and bottom orientation. *When discrete strata [i.e., layers] are identified, each is treated as a separate material so that fibers*

> *are first identified and quantified in that layer only, and then the results for each layer are combined to yield an estimate of asbestos content for the whole sample.* [Emphasis added] [Appx., Doc. 6, p. A-107]

Clearly, there are two clauses to the testing requirements in the italicized sentence that fashions a two-part test, known as "combined layer testing." The first clause requires that the asbestos fibers be quantified in each layer of wall material. Under the second clause, the numerical results are combined to obtain an asbestos content for the entire sample. There is no requirement in the above italicized language that the results for each layer be reported.

The EPA was never satisfied with the combined layer testing method of the Interim Method that it had enacted under the APA, so it fashioned a policy that, if not outright secret, was "unwritten." The unwritten policy, known as "single layer testing," was that, if any one layer of wall material contained greater than 1% ACM, the *entire* sample would be considered ACM under the NESHAP abatement regulations -- even if the combined result of all layers resulted in less than 1% ACM in the sample. Instead of enacting this unwritten policy by observance of APA rulemaking procedures, the EPA issued two publications that it disingenuously characterized as "clarifications" of Section 1.7.2.1. of the Interim Method.

The first EPA "clarification" is titled "Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems," and is published in the Federal

Register, Vol. 59, No. 3, January 5, 1994. [Appx., Doc. 11, pp. A-154 to A-158] The second "clarification" is titled "Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems," and is published in the Federal Register, Vol. 60, pp. 65243-44, December 19, 1995. [Appx., Doc. 12, pp. A-159 to A-165] These publications are hereinafter referred to as "the Clarifications."

Contrary to the express terms of Section 1.7.2.1 of the Interim Method, which do not require the results of each layer be reported, the first Clarification dated January 5, 1994 purports to impose a reporting by layer requirement. "In general," this Clarification provides, "when a sample consists of two or more distinct layers of materials, each layer should be treated separately *and the results reported by layer*." [Emphasis added] [Appx., Doc. 11, A-156]

The second Clarification, dated December 19, 1995, purports to require that if any one layer contains greater than 1% asbestos, the entire sample must be considered ACM even though the mathematical result from the combining of all layers would be less than 1% asbestos fibers. The "EPA's unwritten policy," the 1995 Clarification states, "was that each layer in a multi-layered system was to be analyzed as a separate material (no averaging or dilution by combining layers of asbestos-containing materials with nonasbestos-containing material was allowed)." [Appx., Doc. 12, pp. A-161] It characterizes the January 5, 1994 Clarification as "basically stat[ing] that all multi-layered wall systems . . . must be analyzed as separate materials,

and results were not allowed to be combined to determine average asbestos content (continuing the policy that dilution of an asbestos-containing material is not allowed)." [Appx., Doc. 12, pp. A-162] Finally, the 1995 Clarification states that the entire sample must be treated as asbestos-containing if any one layer exceeds the 1% regulatory threshold. [Appx., Doc. 12, pp. A-164]

> If any layer contains greater than one percent asbestos, that layer must be treated as asbestos-containing. This will have the effect of requiring all layers in a multi-layered system to be treated as asbestos-containing if the layers can not be separated without disturbing the asbestos-containing layer. [Appx., Doc. 12, p. A-164]

In the only other decision to address this issue, *United States v. San Diego Gas & Electric Company*, 2006 WL 3913457 (Nov. 21, 2006) ("*San Diego Gas I*"), the court succinctly articulated how the Clarifications impose new obligations for asbestos abatement, and effect a substantive change to Section 1.7.2.1. of the Interim Method by eliminating the second part of the test that provides for mathematically combining the percent results for each layer.

> The [Clarification] test method ... imposes new obligations on the regulated community by expanding the scope of regulated asbestos containing material. Under the [Interim Method], to determine whether a multi-layered material contains

more than 1% asbestos, a lab technician must (1) qualify the amount of asbestos fibers in each layer; and then (2) combine the results of each layer to determine "an estimate of asbestos content for the whole sample." The material is not regulated unless the combined result yields more than 1 percent asbestos.

The [Clarification] test method eliminates the second prong of the test. It provides that the material is regulated if any layer contains more than 1 percent asbestos. This test clearly expands the scope of the regulated asbestos containing material, because, undoubtedly, some materials previously considered not regulated under the [Interim Method] would be swept into the regulation under the [Clarification] test method. The clarifications, therefore, impose new obligations and duties on the regulated community where none existed prior to the amendment.

The EPA itself acknowledged that the two test methods have significant differences. In the [December 19, 1995 Clarification], the EPA explained its "unwritten policy" regarding analysis of bulk materials has been that "each layer in a multi-layered system would be analyzed as a separate material (no averaging or dilution by combining layers of asbestos-containing material with nonasbestos-containing material was allowed.)" 60 F. Reg. 65243.

> The clarifications, therefore, attempt to carry out this unwritten policy without rulemaking procedures.
>
> * * *
>
> It is clear, therefore, that the EPA did not consider the change a mere interpretation. Rather, the EPA's description of the resulting differences between the [Interim Method] and [the Clarifications] suggests a substantive change. The Notice of Advisory indicates that the impetus behind the change was not to clarify ambiguities; rather, it was to expand the scope of regulated asbestos material.[2] [Appx., Doc. 13, pp. A-182 to A-184]

This differing interpretation of the layered testing requirements was outcome determinative in this case, because the State admitted during oral argument on cross motions for summary judgment in the trial court that it could not establish that the Auditorium contained ACM unless the single layer testing method of the Clarifications applied. "I'm first to admit," the State's counsel stated, "that if you throw out the clarifications, you throw out the State's test results." [R.77:19] In other words, the State could not prove the Auditorium contained greater than 1% ACM under the combined layer testing method of the Interim Method, but instead

---

[2] The San Diego Gas I case is currently on Appeal to the Ninth Circuit. *See* Case Nos. 08-50072, 08-50073, 08-50093, 08-50094, 08-50097, 08-50098 and 08-50099.

relied upon the single layer testing method of the Clarifications. Accordingly, HEI's liability in this case was dependent upon the single layer testing method of the Clarifications that the EPA never legally enacted through APA rulemaking.

The Supreme Court of Wisconsin's decision in this case held HEI liable for civil asbestos abatement violations under the NESHAP on the basis of the single layer testing method of the Clarifications. In so holding, the court endorsed the EPA's long held unwritten policy against the combined layer testing method that the EPA had enacted under Section 1.7.2.1. of the Interim Method. The Wisconsin decision expressly rejected the reasoning and holding in *San Diego Gas I.*

As discussed, *infra*, the Wisconsin decision, if allowed to stand, increases the economic and social cost of asbestos abatement for building renovations across the United States, and dramatically increases the liability of owners and operators of building renovations for asbestos abatement violations -- without the opportunity for notice and comment by scientists qualified to set safety standards.

### B. The Federal Issue Concerning The Violation Of HEI's Substantive Due Process Rights.

The second federal question is whether -- if one were to accept the Clarifications as a validly enacted administrative regulation -- the decision of the Supreme Court of Wisconsin violated HEI's

substantive due process rights under the 14th amendment to the U.S. Constitution in two respects.

First, the record is uncontroverted, and the Supreme Court of Wisconsin expressly recognized, that HEI's pre-demolition testing and sampling protocols (1) did not violate either the Interim Method or the Clarifications, and (2) established that the Auditorium did not contain ACM. In summary judgment practice before the trial court, the State could not prove that HEI's sampling and testing protocols violated any regulations, and the State admitted that it could "only guess or speculate why [HEI's pre-demolition testing] came back negative [for ACM]." [R.46:9] Moreover, the parties stipulated in the trial court that both HEI's tests results that were negative for ACM and the State's test results that were positive for ACM "are accurate within the analytical testing method that [the] laboratory utilized . . ." [R. 70:3,¶3] [Appx., Doc. 14, p. A-199]

The Supreme Court of Wisconsin nevertheless held HEI liable on the basis of samples of wall material the State took during and after demolition that were positive for ACM. The court, however, did not articulate a rational basis for accepting the State's test results and rejecting HEI's test results. Quite the contrary, the Supreme Court of Wisconsin held that that "liability for asbestos abatement violations "does not depend on whether an owner or operator conducts pre-demolition sampling [and] testing in accord with the regulations." *Harenda*, 2008 WI 16, ¶71, ___ Wis. 2d at ___, 746 N.W. 2d at 41.

As discussed, *infra*, the effect of this decision on a national basis is that, whenever the government's testing obtains positive "hits" for ACM, the government is entitled to an irrebuttable presumption that the private citizen is guilty of criminal and/or civil asbestos abatement violations even though the private citizen's sampling and testing protocols satisfy the NESHAP and are negative for ACM.

Second, the decision of the Supreme Court of Wisconsin held HEI liable on the basis of sampling protocols by the State that violated the sampling requirements in the Interim Method. The sampling protocols in Sections 1.7.1, 1.7.2.1, 1.7.2.3, 1.7.2.4 and Reference 5 of the Interim Method require that the sampler, be it the government or a private party, obtain representative samples of the wall material by sampling all of the layers. The record is uncontroverted that the State failed to prove that its positive test results for ACM were based upon representative samples that contained all of the layers of wall material.

As discussed, *infra*, the effect of this holding on a national basis is to write the representative sampling requirements out of the Interim Method.

### C. The Federal Issue Concerning The Interim Method Being Void For Vagueness.

The third federal issue is whether the Interim Method is unconstitutionally vague and therefore

unenforceable under the 14th Amendment to the U.S. Constitution.

The State's thesis in the lower courts was that (1) the operative language of the Interim Method is vague, confusing, and unclearly written, and therefore, (2) the clarifications are necessary to give the Interim Method meaning.

HEI's rejoinder to this argument was two-fold. First, HEI argued that the Interim Method is clear on its face, and requires that the percent asbestos results for each layer be combined for an overall result. Second, HEI argued that, if the State were correct in its thesis that the Interim Method is unclearly written and in need of clarification, then the Interim Method, by itself, would be void under the 14th amendment vagueness doctrine. *Women's Medical Center of Northwest Houston v. Bell*, 248 F. 3d 411 (5th Cir. 2001).

## II. STAGE OF THE PROCEEDINGS IN THE LOWER COURTS WHEN THE FEDERAL QUESTIONS WERE RAISED.

HEI raised the federal questions it seeks to have reviewed in virtually every stage of the proceedings in the trial court, Wisconsin Court of Appeals, and the Supreme Court of Wisconsin. The manner in which HEI raised the federal questions was in a motion for summary judgment to the trial court and in a motion in limine to the trial court, both of which the trial court denied. [Appx., Doc. 15, p. A-204; Appx., Doc. 16, p. A-209 ] Instead, the trial court granted a cross motion for summary judgment

filed by the State on liability. [Appx., Doc. 17, p. A-224] The parties stipulated that the amount HEI should pay for the alleged violations and costs would be $37,138.50 should the trial court hold HEI liable and should the trial court's rulings on liability be upheld. [Appx., Doc. 14, p. A-198]. Having granted the State's motion for summary judgment on liability, and the parties having stipulated to damages, the trial court entered a money judgment against HEI in the $37,138.50 stipulated amount.[3] [Appx., Doc. 18, pp. A-226 to A-229]

In its opinion dated October 31, 2006, the Wisconsin Court of Appeals addressed the federal question concerning the enforceability of the Clarifications, holding that the single layer test method of the Clarifications effected a substantive change in the combined layer testing method of the Interim Method. Since the Clarifications had not been enacted through valid administrative rulemaking under the APA or its Wisconsin equivalent, Wis. Stat. §227.16-18, and since HEI's liability for a violation of the NESHAP was dependent upon the State's single layer Clarification Method testing, the Wisconsin Court of Appeals held that the State's single layer Clarification method test results could not serve as the basis to hold HEI liable for a NESHAP violation. Accordingly, the Court of Appeals reversed the trial court's grant of summary judgment to the State in a unanimous 3-0

---

[3] While the parties stipulated to damages in the amount of $37,138.50, HEI's potential exposure in this case in the absence of a stipulation concerning damages exceeded $4 million. *See* p. 23, *infra*.

decision. The court did not address the federal questions concerning the substantive due process violation or vagueness. *See State of Wisconsin v. Harenda Enterprises, Inc.*, 2006 WI App 230, 297 Wis. 2d 571, 724 N.W.2d 434 (Ct. App. 2006). [Appx., Doc. 2, pp. A-57 to A-69]

In ruling against HEI, the Supreme Court of Wisconsin rejected all federal questions concerning the Interim Method and the Clarifications, substantive due process and vagueness in its opinion dated March 13, 2008. Accordingly, the Supreme Court of Wisconsin reversed the Court of Appeals and reinstated the trial court's summary judgment in favor of the State. *State of Wisconsin v. Harenda Enterprises, Inc.*, 2008 WI 16, ___ Wis. 2d ___, 746 N.W. 2d 25 (2008). The Supreme Court of Wisconsin expressly rejected the reasoning of the Southern District of California in the *San Diego Gas I* case. [Appx., Doc. 1, p. A-32]

HEI moved for reconsideration on April 2, 2008. The Supreme Court of Wisconsin denied the motion by a 4-3 decision in an order dated June 11, 2008. [Appx., Doc. 3, pp. 70-72]

## RULE 14.1(h): REASONS WHY THE WRIT SHOULD BE ISSUED

### I. THIS COURT SHOULD GRANT CERTIORARI UNDER RULE 10(c) BECAUSE THE SUPREME COURT OF WISCONSIN HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

#### A. This Court Should Settle The Federal Question Concerning The Single Layer v. Combined Layer Testing Method Because The EPA's Illegal Rule Significantly Increases The Economic And Social Cost Of Asbestos Abatement Nationally.

The facts in the record of this case are uncontroverted that the single layer testing method of the Clarifications expand the reach of federal regulation and increases the amount of asbestos that will have to be abated, and thereby increases the social and economic cost of building renovations. [R.52:¶3] These facts are confirmed by an August 1, 1994 EPA "Notice", 59 Fed. Reg. 38970, which recognizes that the Clarifications have the effect of increasing the amount of asbestos to be abated under the NESHAP.

> The [Interim Method] provided that the analytical result for a multi-layered sample with discrete strata be reported as one result across all layers. Because the

> [Interim Method] allowed the result to be reported as one number, multi-layered samples which may contain asbestos in a single layer may have been reported by laboratories as nonasbestos-containing. The [Clarifications] directs laboratories to analyze and report a result for individual layers. Thus, more than one result will be reported for multi-layered samples, and *a multi-layered sample which previously was determined to be nonasbestos-containing may now have layers which will be classified as asbestos-containing based on the presence of asbestos in greater than 1 percent.*" [Appx., Doc. 19, p. A-233] [Emphasis added]

The *San Diego Gas I* court likewise recognized that the EPA's illegal rule will have the effect of increasing the amount of asbestos required to be abated. The Clarification test method "clearly expands the scope of the regulated asbestos containing material," the court held, "because, undoubtedly, some materials previously considered not regulated under the [Interim Method] would be swept into the regulation under the [Clarification] test method." Therefore, the court held, the EPA's illegal rule "expand[s] the scope of regulated asbestos containing material." [Appx., Doc. 13, p. A-182]

Indeed, the cost of asbestos abatement in buildings has been, and continues to be, astronomical. A February 11, 1999 article in USA Today outlined the following social and economic

costs of asbestos removal and the limited health benefits associated therewith.

> Asbestos removal, the biggest environmental cleanup project in U.S. history, has cost an estimated $50 billion over the past 20 years. It has forced schools to lay off teachers, caused owners to abandon buildings and added considerably to the cost of remodeling many houses.
>
> But one thing the colossal investment hasn't done is produce a measureable improvement in the public's health.[4]

These exorbitant costs will continue to mount. A fall 1991 Masters thesis estimated the cost to abate asbestos in buildings over the subsequent 25 years to be $100 billion.[5] This estimate may be conservative, as the EPA estimated that more than 733,000 structures, or 20 percent of U.S. commercial and public properties, are believed to contain asbestos.[6] The annual cost of asbestos removal from U.S. buildings is approximately $3 billion."[7]

---

[4] Dennis Cauchon, When Removing Asbestos Makes No Sense: Risk Of Cancer In USA Is Barely Measurable, USA Today, February 11, 1999, at 01.A.

[5] Albert J. Banks, Jr., Asbestos Removal In The Construction Industry (1991) (M.S. thesis, University of Florida (Gainesville)), p. 1.

[6] *Id.*; *see also* Louis S. Richman, Why Throw Money At Asbestos, Fortune Magazine, June 6, 1988.

[7] Cauchon, *supra.*

### B. This Court Should Settle The Federal Question Concerning The Single Layer v. Combined Layer Testing Method Because The Supreme Court Of Wisconsin's Decision Increases Potential Asbestos Liability In Building Renovations.

The dollar amount of potential liability of owners and operators of buildings for asbestos abatement violations parallels the astronomical dollar cost of abatement. Indeed, the dollar amount of the forfeitures under Wisconsin's version of the CAA, Wis. Stat. §285.87(1), that the State could have potentially obtained against HEI in this case for NESHAP abatement violations under NR 447 are significant. The statute provides a maximum forfeiture of $25,000 per day per violation. [Appx., Doc. 20, pp. A-238] Forfeitures under the CCA are comparable. *See* 42 U.S.C. §7413(b). [Appx., Doc. 21, p. A-240]

The State's complaint against HEI alleged five separate violations which the state contends ran for 33 days from March 1, 2002 to April 2, 2002. If the State were to prove its case, and if the court were to impose the maximum penalty of $25,000 per day for five violations for 33 days, then some quick arithmetic would show that HEI's potential exposure would be excess of $4 million (33 days X 5 violations X $25,000 per day = $4,125,000).

In light of these punishing liabilities, huge economic and social costs of abatement, and

questionable health benefits, an EPA rule that increases the types of unregulated material now subject to regulation, increases the amount of asbestos to be abated, and increases the attendant cost should only be promulgated by strict observance of proper administrative rulemaking procedures under the CAA and/or the APA. It should not be accomplished by the administrative fiat of the Clarifications. This Court should accordingly settle the matter by granting certiorari under Rule 10(c).

## II. THIS COURT SHOULD GRANT CERTIORARI UNDER RULE 10(b) AND/OR RULE 10(c) BECAUSE THE INCONSISTENT DECISIONS BY THE LOWER COURTS WARRANT THAT THE FEDERAL ISSUE CONCERNING SINGLE LAYER VERSUS COMBINED LAYER TESTING BE SETTLED BY THIS COURT.

The decisions of the Supreme Court of Wisconsin in this case and the Southern District of California in the *San Diego Gas I* case are squarely at odds with each other on the federal issue concerning single layer versus combined layer testing -- *i.e.*, on the federal issue whether the Clarifications are a substantive change to the Interim Method such that Clarification method, single layer testing cannot serve as the basis for liability under the asbestos abatement regulations because the EPA did not promulgate the Clarifications through observance of rulemaking procedures under the APA. Indeed, the Supreme Court of Wisconsin, in holding that the Clarifications are supposedly a valid interpretation of the Interim

Method, squarely held "[t]he court's conclusion [to the contrary in *San Diego Gas I*] turns on an interpretation of § 1.7.2.1 that we have rejected." *Harenda*, 2008 WI 16, ¶63, ___ Wis. 2d ___, 746 N.W. 2d at 40. [Appx., Doc. 1, p. A-32]

Technically, Rule 10(b) provides for certiorari when a decision of a state court of last resort, such as the Supreme Court of Wisconsin, conflicts with a decision of a federal court of appeals, not a federal district court such as the *San Diego Gas I* court. The text of Rule 10, however, allows flexibility in the rule, providing that subparagraphs 10(a)-(c) are "neither controlling nor fully measuring the Court's discretion," and that subparagraphs 10(a)-(c) merely "indicate the character of the reasons the Court considers." The "character" of Rule 10(b) indicates that the Court will consider cases where the highest state court has decided an issue that is at odds with a federal court on a federal issue of national importance such as the applicability of the Clarifications in the instant case.

Even if Rule 10(b) were found not applicable when the conflicting decisions are between a state Supreme Court and a federal district court, the conflicting state/federal decisions in this case warrant that this Court grant certiorari under Rule 10(c) and thereby settle the federal issue concerning the enforceability of the Clarifications so that there can be national uniformity for asbestos testing and liability. Indeed, the conflicting views of the judges who have passed on this issue calls out for this court to settle it once and for all.

A total of 12 judges, for example, have considered the federal issue in this case -- one (1) in the Southern District of California, seven (7) on the Wisconsin Supreme Court, three (3) on the Wisconsin Court of Appeals, and one (1) in the Circuit Court of Milwaukee County. Of those 12, seven (7) have held that the Clarifications are unenforceable because they effect a substantive change to the Interim Method without having undergone rulemaking under the APA. The seven judges who so held include the judge in the Southern District of California, three (3) dissenting justices on the Supreme Court of Wisconsin, the three (3) judge unanimous decision in the Wisconsin Court of appeals. The five judges who ruled to the contrary include four (4) justices in the Supreme Court of Wisconsin majority decision, and the trial court judge in the Circuit Court of Milwaukee County.

Given the inconsistency in the decisions of the 12 jurists who have reviewed this issue, it is clear that the issue is not going away. Litigants in future cases in other state and federal courts will undoubtedly argue in favor of or against the reasoning of the court in the *San Diego Gas I* case and the reasoning of the Supreme Court of Wisconsin in this case. Given the 7-5 track record of the issue in Wisconsin and in the Southern District of California thus far, there will undoubtedly be more inconsistent decisions. Whether viewed from the standpoint of this Court resolving inconsistent decisions under Rule 10(b) or this Court "settling" an issue under Rule 10(c), certiorari is warranted.

## III. THIS COURT SHOULD GRANT CERTIORARI ON THE SUBSTANTIVE DUE PROCESS ISSUE UNDER RULE 10(c) BECAUSE IT HAS NATIONAL IMPLICATIONS FOR THE COST OF ASBESTOS ABATEMENT AND LIABILITY.

### A. This Court Should Settle The Substantive Due Process Issue Concerning Whether The State's Positive Test Results Are Presumptively Valid And The Defendant's Negative Test Results Are Presumptively Invalid.

The Supreme Court of Wisconsin recognized that HEI's "pre-demolition sampling and testing . . . did not indicate that material from the disputed area was ACM." *Harenda*, 2008 WI 16, ¶75, ___ Wis. 2d at ___, 746 N.W. 2d at 42. It further recognized that "the State has offered no argument that Harenda failed to conduct its pre-demolition sampling and testing according to the regulations," and that "the State offers no opinion on the issue." *Harenda*, 2008 WI 16, ¶71, ___ Wis. 2d at ___, 746 N.W. 2d at 41. Notwithstanding its finding that HEI's pre-demolition testing complied with applicable regulations, the court nevertheless held that the liability of an asbestos investigator like HEI "does not depend on whether an owner or operator conducts pre-demolition sampling [and] testing in accord with the regulations." *Id.*

This holding that an asbestos investigator's liability "does not depend on whether an owner or operator conducts pre-demolition sampling [and] testing in accord with the regulations" begs the question: On what legal standard does the asbestos investigator's liability turn where, as here, a court recognizes that (1) there are dueling test results, (2) the investigator's testing found no ACM, and (3) the investigator's testing complied with all applicable sampling and testing regulations?

According to the Supreme Court of Wisconsin, HEI's liability turned on the fact that "the array of positive tests is sufficient to show the presence of ACM." *Harenda*, 2008 WI 16, ¶75, ___ Wis. 2d at ___, 746 N.W. 2d at 42. The court summarized all of the test results, and noted that "Harenda's pre-demolition sampling and testing was the only set of tests that did not indicate that materials from the disputed area was ACM." *Id.* The "array" of test results, however, were simply the State's post demolition positive hits for ACM and HEI's pre-demolition negative hits for ACM.[8] The Supreme

---

[8] HEI "split" one set of the post demolition samples with the State, and HEI's results had some positive "hits" for asbestos. The results of HEI's split samples tests are not valid, because the laboratory did not "point count" the results as required by the Interim Method, and did not mathematically combine the single layer results for each sample to obtain a composite result as required by the Interim Method, but instead accepted the single-layer positive results per the Clarifications. [R. R.47: 20-25] Accordingly, the "array" of test results to which the court referred was simply the State's post demolition positive hits and HEI's pre-demolition negative results. (HEI did not have the laboratory "point count" the results, because the State obtained what it contended were positive findings for asbestos

Court of Wisconsin never provided a fair and rationale explanation of why it accepted the State's "array" of post-demolition positive "hits" for ACM, and rejected HEI's pre-demolition "array" of negative test results.

The effect of the court's decision is to hold that, when the defendant's test results are negative for ACM and the government's results are positive for ACM, there is an irrebuttable presumption that the government's results are valid, and the defendant's results are not valid. From here, there is a concomitant presumption of criminal guilt and/or multi-million dollar civil liability whenever the government obtains positive hits for ACM even if (1) the defendant's test show no ACM, and (2) both the court and the government admit that the defendant's sampling and testing did not violate any regulations. The defendant is presumptively and irrebuttably guilty whenever the government obtains positive hits for ACM despite overwhelmingly negative test results to the contrary.

The Supreme Court of Wisconsin's holding that the government's test results are automatically valid and that the defendant's are not has national implications for asbestos abatement. It effectively means that any post-demolition positive test result by the State establishes liability despite the number

---

in its point counting of the positive findings on the split samples, because HEI did not believe the State would have agreed to restart the demolition even if HEI's laboratory had point counted the split samples to a non-regulated amount of asbestos of less than 1%, and because point counting involves additional expense.) [R.63:3]

of pre-demolition negative tests the defendant obtained. Under this "any one positive test establishes liability" standard, the defendant could have 100 pre-demolition negative tests and 100 post-demolition negative tests, and the State could find just one unrepresentative sample in a post-demolition "debris" pile, and hold the asbestos investigator liable. The defendant's accurate, good faith pre-demolition testing that complied with sampling and testing regulations is irrelevant under the Supreme Court of Wisconsin's holding.

This Court should issue the writ of certiorari in this case under Rule 10(c), because the national implications of this holding for the cost of asbestos abatement is catastrophic. Since the defendant's accurate and good faith testing becomes irrelevant if the government obtains one positive hit for asbestos, the amounts that asbestos investigators, abatement contractors and others would have to charge in order to protect themselves from the risk of one positive hit for asbestos subjecting themselves to ruinous liability increases dramatically.

### B. This Court Should Settle The Substantive Due Process Issue Concerning Whether Liability For Asbestos Abatement Violations Must Be Based Upon Representative Samples.

The State's test results on which the trial court and the Supreme Court of Wisconsin relied to find HEI liable raise another federal issue of national importance concerning the requirement in

the Interim Method that tests be based upon representative samples of wall material. As discussed below, the Interim Method requires that the samples of wall or other material be representative in the sense of containing all of the layers. The record in this case is uncontroverted, however, that the State's test results were "grab samples" from "debris piles" that were not representative of all of the layers, or were otherwise non-representative.

The decision of the Supreme Court of Wisconsin in this case effectively wrote the representative sample requirement out of the Interim Method. This decision is again squarely at odds with another unpublished decision of the Southern District of California in the *San Diego Gas* case dated December 7, 2007. *See United States v. San Diego Gas & Electric Company*, 2007 WL 4326773 (December 7, 2007) (hereinafter "*San Diego Gas II*").[9] [Appx., Doc. 22, pp. A-248 to A-276] The conflicting decisions again warrant certiorari on an important federal issue that should be settled by this Court under Rule 10(b) or 10(c).

Section 1.7.1 of the Interim Method, for example, provides in relevant part that "[s]amples for analysis of asbestos content shall be taken in the manner prescribed in Reference 5 . . . If there are any question about the representative nature of the sample, another sample should be requested before proceeding with the analysis." [Appx., Doc. 6, p. A-

---

[9] The San Diego Gas II case is also on appeal to the Ninth Circuit. *See* Case Nos. cited in f/n 3, *supra*.

106] Reference 5 is an EPA document entitled "Asbestos-Containing Materials in School Buildings: A Guidance Document" (hereinafter "Reference 5"). [Appx., Doc. 23, pp. A-277 to A-286][10] Under the heading "How To Take A Sample," Reference 5 states, "a representative sample should be taken from within the material itself by *penetrating the depth of material* with a sample container." [Appx., Doc. 23, Ch. 5, p. A-283] [emphasis added] Reference 5 further emphasizes that the sampler must "be sure to *penetrate* any paint or protective coating and *all layers of material.*" [Appx., Doc. 23, Ch. 5, p. A-258] In this case, the State admitted that applicable sampling regulations require the sampler to attempt to obtain all layers when taking wall samples. [R.44:72; R.44:141]

In addition to requiring a representative sample that contains all layers, the NESHAP/Interim Method mandates in Sections 1.7.2.1 through 1.7.2.4 that the laboratory analyst actually perform the laboratory test on all layers. The tests include testing on all layers (Section 1.7.2.1), fiber identification (Section 1.7.2.3), and quantification of the material (Section 1.2.7.4). [Appx., Doc. 6, pp. A-107 to A-117] Accordingly, the Interim Method requires *both* a representative sample containing all of the layers *and* performance of the correct test on the sample.

---

[10] Because of the length, only the cover page, table of contents, introductory material and Chapter 5 of Reference 5 are included with the Appx., Doc. 23.

The record in the instant case is uncontroverted that the State did not take representative samples as required by the Interim Method. HEI's liability in this case derived from three sampling events that the State undertook on March 21, 2002, April 2, 2002, and April 4, 2002. It is undisputed that the March 21, 2002 sampling event was from intact walls that were still standing, but the State did not prove that it obtained complete penetration of all wall material in order to obtain a representative sample as required by the Interim Method. [R.62:14-15] It is also undisputed that the samples the State collected in the April 2, 2002 sampling event were from debris piles of demolished wall material. [R.62:19-20] Finally, the record its undisputed that the samples the State collected from the April 4, 2002 sampling event were "grab samples" from debris piles of demolished wall material. [R.44:72; R.44:78-79; R.44:83; R.44:148]

As discussed, all of HEI's pre-demolition testing of wall material in the Auditorium was from intact walls, and the State was never able to establish that any of HEI's sampling or testing violated the Interim Method, the Clarifications or any other laws or regulations. The trial court and the Supreme Court of Wisconsin nevertheless held HEI liable on the basis of the State's test results that were from unrepresentative samples that violated the Interim Method. Effectively, these two Wisconsin courts wrote the representative sample requirements out of the Interim Method.

In its December 7, 2007 opinion granting the defendants' motion for a new trial, the *San Diego*

*Gas II* court phrased the issue as "whether a 'representative sample' as defined in Section 1.7.1 and [Reference 5] is required before the sample may be admitted for purposes of establishing asbestos content?" [Appx., Doc. 22, p. A-272] The Court held that the Government committed a manifest error by offering test results that did not contain all of the layers and that therefore did not comply with Section 1.7.1 and Reference 5 and by arguing to the jury that representative sampling is not required. "The admission of both non-representative samples and samples tested under methods of debatable validity combined with the manner in which the results were argued to the jury," the court held, "caused unfair prejudice and confusion of issues." [Appx., Doc. 22, pp. A-274 to A-275]

In so holding, the *San Diego Gas II* court articulated the following substantive due process violations inherent in holding an owner or operator liable on the basis of post-demolition testing of samples that are not representative.

> If the Government is not required to test samples that are representative of the suspected ACM, a party's guilt or innocence would depend entirely upon the sample collected, no matter how contaminated or unrepresentative. The Government's proposed rule would permit the following situation: a company tests ACM using a representative sample, finds it is not RACM, and on that information, properly concludes there is no obligation to comply with the NESHAP requirements. Later,

> after demolition or renovation activities begin, the regulatory authorities retrieve and test bits and pieces from the project that may not be representative or whole samples. If such samples reveal high concentrations of asbestos, the company would be subject to criminal prosecution for asbestos NESHAP violations even when the ACM, based upon a representative sample, is not RACM. Such a result would violate basic principles of due process, which "require[] legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement" of the law." Smith v. Goguen, 415 U.S. 566, 572-73 (1974) [f/n omitted]

[*San Diego Gas II*, Appx., Doc. 22].

A review of the facts in the record in the instant case indicates that the exact same thing happened here. The record, as stated, is uncontroverted that HEI's pre-demolition sampling and testing was from intact walls and it satisfied all regulations. Representatives of the State then "swooped-in" during renovation and after renovation, and sampled material that did not contain all of the layers.

The Supreme Court of Wisconsin effectively held that the practice of a controlling government authority to sample less than all of the layers -- a practice that essentially writes the sampling

requirements out of the Interim Method -- is perfectly acceptable. The *San Diego Gas II* court, however, held that the practice is unacceptable precisely because it both violates the express terms and the Interim Method and offends basic notions of substantive due process. Given the inconsistency between the decisions by the Supreme Court of Wisconsin and the *San Diego Gas II* court on this issue, and given the significant cost of asbestos abatement and the potential liabilities for violation of the abatement regulations, this Court should accept certiorari under Rule 10(c) and settle the issue.

## CONCLUSION

In the final analysis, the Supreme Court of Wisconsin endorsed an illegal rule that the EPA unilaterally issued without administrative rulemaking. The court also wrote the representative sampling requirement out of the Interim Method, and it fashioned its own rule providing that a defendant is irrebuttably guilty of asbestos violations whenever the State obtains positive hits for asbestos even though the defendant's test results are negative and even though the defendant's testing satisfies the NESHAP. Because of the impact of this decision nationally on the economic and social cost of asbestos abatement, this Court should grant certiorari and settle the issue.

Dated this 3rd day of September, 2008.

Mark W. Rattan
Counsel of Record for Petitioner
Litchfield Cavo, LLP
13400 Bishops Lane, Suite 290
Brookfield, WI 53005-6237
(262) 784-8966

# DOCUMENT 1

746 N.W.2d 25, 2008 WI 16
Supreme Court of Wisconsin.
STATE of Wisconsin, Plaintiff-Respondent-Petitioner,
v.
HARENDA ENTERPRISES, INC., Defendant-Appellant.
**No. 2005AP1829.**

Argued Oct. 3, 2007.
Decided March 13, 2008.

746 N.W.2d 25, 2008 WI 16
Supreme Court of Wisconsin.
STATE of Wisconsin, Plaintiff-Respondent-Petitioner,
v.
HARENDA ENTERPRISES, INC., Defendant-Appellant.
No. 2005AP1829.

Argued Oct. 3, 2007.
Decided March 13, 2008.

¶ 1ANN WALSH BRADLEY, J.
The petitioner, State of Wisconsin, seeks review of a published court of appeals decision reversing a circuit court judgment in favor of the State and imposing civil penalties and surcharges on Harenda Enterprises, Inc. (Harenda). FN1 The judgment and sanctions imposed were for violations of Wis. Admin. Code Ch. NR 447 in connection with Harenda's contract to inspect the Milwaukee Auditorium for possible asbestos-containing material (ACM).

FN1.*See State v. Harenda Enterprises, Inc.*, 2006 WI App 230, 297 Wis.2d 571, 724 N.W.2d 434 (reversing judgment of the circuit court for Milwaukee County, Kitty K. Brennan, Judge).

¶ 2 The case centers on the question of the proper method for testing whether material constitutes asbestos-containing material under Wis. Admin. Code § NR 447.02FN2 and 40 C.F.R. Pt. 763, Subpt. E., App. E, § 1.7.2.1. The State asserts that the court

of appeals erred in concluding that the rule prescribing the method of testing clearly requires the averaging of the test results. It contends that the rule is ambiguous and that we should give deference to the clarifications of the rule issued by the United States Environmental Protection Agency (EPA), which explain that each layer of a multi-layer sample must be tested. It maintains that under the rule, ACM is present if a single layer of the sample contains greater than one percent asbestos.

> FN2. All references to chapter NR 447 of the Wisconsin Administrative Code are to the June 2004 version unless otherwise noted.

¶ 3 Harenda argues that the State's interpretation is inconsistent with the plain language of the rule, which requires averaging of the test results. It maintains that the clarifications issued by the EPA are inconsistent with § 1.7.2.1 and should therefore be accorded no deference. Harenda further argues that the clarifications outlining the single layer test method constitute impermissible rule making. Finally, it argues that the State's enforcement action violates its substantive due process rights.

¶ 4 We determine, first, that the language of § 1.7.2.1 is ambiguous. Giving deference to an agency's interpretation of its own rule, we conclude that the EPA's interpretation is controlling because it is neither inconsistent with § 1.7.2.1 nor clearly erroneous. We further determine that the clarifications do not constitute impermissible rule making; rather, they are valid interpretive rules. Finally, we determine that the circuit court's

judgment does not violate Harenda's substantive due process rights. We therefore reverse the court of appeals.

*29 I

A

¶ 5 To better understand the issues presented, it is helpful to examine the regulatory framework. We begin with a brief summary of the federal and state regulations at play in this case.

¶ 6 Under the federal Clean Air Act, the United States Environmental Protection Agency (EPA) is authorized to publish a list of hazardous air pollutants and to establish national emission standards (National Emission Standards for Hazardous Air Pollutants, or "NESHAPs") for each pollutant on the list. 42 U.S.C. § 7412; *United States v. American National Can Co.*, 126 F.Supp.2d 521, 523 (N.D.Ill.2000). Asbestos was one of the first pollutants designated as hazardous under the Clean Air Act. *National Can*, 126 F.Supp.2d at 523.

¶ 7 The original asbestos NESHAP was published in 1973, and included standards governing removal of asbestos prior to building demolition. 38 Fed.Reg. 8,820 (1973). In 1975, the asbestos NESHAP was expanded to address the handling of asbestos during building renovations. 40 Fed.Reg. 48,293 (1975); *National Can*, 126 F.Supp.2d at 523. The current asbestos NESHAP, which was published in 1990, is found at 40 C.F.R. § 61.140 et seq.

¶ 8 The Wisconsin Department of Natural Resources (DNR) is authorized by the Wisconsin Statutes to promulgate rules implementing clean air standards consistent with chapter 285 of the Wisconsin Statutes and the federal Clean Air Act. Wis. Admin. Code § NR 447.01(2); [FN3] Wis. Stat. §§ 285.11, 285.13, 285.17, 285.27.[FN4] Pursuant to this authority, the DNR promulgated rules concerning asbestos inspection, identification, and abatement. These rules are set forth in chapter NR 447 of the Wisconsin Administrative Code.

> FN3.Wis. Admin. Code § NR 447.01(2) provides:
>
> > (2) PURPOSE. This chapter is adopted under §§ 285.11, 285.13, 285.17 and 285.27, Stats., to establish emission limitations for asbestos air contaminant sources, to establish procedures to be followed when working with asbestos materials and to create additional reporting and recordkeeping requirements for owners or operators of asbestos air contaminant sources in order to protect air quality.
>
> FN4. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶ 9 Chapter NR 447 is patterned after the federal NESHAP standards. *See* note to Wis. Admin. Code § NR 447.01. Most importantly with respect to the present matter, chapter 447 has adopted measures requiring owners and operators to inspect facilities

prior to demolition or renovation. Wis. Admin. Code § NR 447.06(1). If such an inspection reveals enough asbestos, the notification and abatement requirements of sections NR 447.07 and 447.08 apply to each owner or operator. Wis. Admin. Code § NR 447.06(2). Violations of the regulations are strict liability offenses. *United States v. B & W Inv. Properties*, 38 F.3d 362, 367 (7th Cir.1994).

¶ 10 As discussed more fully below in Part III A, the regulations define ACM as material that contains "more than 1% asbestos as determined using the method specified in Appendix E to Subpart E, 40 C.F.R. part 763, section 1, Polarized Light Microscopy...."Wis. Admin. Code § NR 447.02(1)(a). The regulations describing the proper way to analyze a multi-layered sample include the following instructions: "When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, and then the results for each layer are combined to ***30** yield an estimate of asbestos content for the whole sample." 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1. Wisconsin adopted both the definition and the instructions describing the method of analysis. Wis. Admin. Code § NR 447.02; Wis. Admin. Code § NR 484.04(28)(July 2007).

¶ 11 The text of the instructions, however, quickly became a source of confusion. On two occasions the EPA issued notices of clarification to address how multi-layered samples are to be analyzed. 59 Fed.Reg. 542 (Jan. 5, 1994); 60 Fed.Reg. 65,243 (Dec. 19, 1995).

¶ 12 The December 1995 clarification explained that § 1.7.2.1 continued EPA's past policy that separate layers in multi-layered systems were to be analyzed separately, such that "no averaging or dilution by combining layers of asbestos-containing material with nonasbestos-containing material was allowed." 60 Fed.Reg. 65,243 (Dec. 19, 1995).

¶ 13 The clarification allowed that a source sending a multi-layered sample to a laboratory for testing may request that certain samples first be composited for analysis in an effort to reduce time and the costs associated with the sample. It advised that when the composite analysis indicates that the average of the sample's layers is greater than one percent, the sample is deemed to be ACM and an individual analysis of the layers is not necessary. However, when the composited sample analysis results in less than one percent asbestos, but greater than zero, an "analysis by layers is required to ensure that no layer in the system contains greater than one percent asbestos." *Id.*

¶ 14 Pursuant to its regulatory authority the DNR initiated an enforcement action against Harenda. In this case we examine whether we owe deference to an agency's interpretation of its own rule concerning the testing of multi-layered samples for asbestos content.

B

¶ 15 The background facts of this case are not in dispute. The circuit court set forth those facts in its Findings of Fact and Conclusions of Law entered

along with its order granting judgment in the State's favor.

¶ 16 This case stems from a decision by the Wisconsin Center District to renovate the Milwaukee Auditorium. In 2001, the Wisconsin Center District retained Harenda to conduct an inspection of the Auditorium for possible ACM prior to renovation. Among the areas Harenda inspected were the walls of the Auditorium's second floor bowl area (the "disputed area"). As part of its pre-demolition inspection, Harenda took samples from the disputed area and sent them to a testing laboratory. The test results indicated that none of the samples contained greater than one percent asbestos.

¶ 17 The demolition of the disputed area, which was carried out by a contractor, commenced in March 2002 and proceeded without following chapter NR 447 asbestos abatement regulations. After demolition had started, representatives of the State took samples from the walls of the disputed area for testing. The laboratory that tested the samples found a layer in a multi-layered sample that contained greater than one percent asbestos. Demolition ceased, and the State collected three further samples from the disputed area. The tests on these samples showed that the samples each contained greater than one percent asbestos.

¶ 18 Two days later, the State collected ten samples of plaster material from the disputed area that had been demolished. It provided a "split" of each of these samples*31 to Harenda. The laboratory found

that four of the State's ten samples were multi-layered samples containing a single layer of material with one percent asbestos or more, but with an overall asbestos content of less than one percent.

¶ 19 Harenda sent its split samples to an independent laboratory for testing. The laboratory found five of the ten samples were multi-layered samples containing a single layer of two percent asbestos and one layer of material that was a non-detect for asbestos. In contrast to the laboratory used by the State, Harenda's laboratory did not obtain an overall asbestos content for the five multi-layered asbestos-containing samples.[FN5]

> FN5. We note that all of the tests performed on samples for both parties were performed based upon the interpretation of regulations advocated by the State. The court of appeals decision in this case indicates some confusion in this regard. In the first paragraph of its opinion, the court concludes that "Harenda's testing for asbestos contamination complied with the law, and, accordingly, [we] reverse." *Harenda Enterprises*, 297 Wis.2d 571, ¶ 1, 724 N.W.2d 434.At oral argument, however, Harenda stated that the laboratory conducting the pre-demolition testing was instructed to conduct tests that complied with EPA's clarifications. Thus, the issue is not whether the test on Harenda's pre-demolition samples was conducted according to a different interpretation of the regulations. Rather, the question is whether a single layer in a multi-layer system containing greater

than one percent asbestos must be treated as ACM.

¶ 20 The State, upon the request of the DNR, filed a complaint against Harenda. Based on the tests of its samples from the disputed area, the State alleged that material from the disputed area contained a sufficient amount of ACM for it to be considered regulated asbestos-containing material. It alleged that Harenda was therefore liable for violations of several provisions of Wis. Admin. Code Ch. NR 447. These include failure to adequately wet ACM in violation of § NR 447.08(6)(a), failure to carefully lower ACM in violation of § NR 447.08(6)(b), failure to remove ACM prior to demolition activity in violation of § NR 447.08(1), discharge of visible emissions to the outside air during the disturbance of ACM in violation of § NR 447.13(1), and failure to file an accurate notice of intent to renovate a facility containing ACM in violation of § NR 447.07.

¶ 21 The parties entered into a stipulation according to which Harenda would owe $37,138.50 in penalties and surcharges if it were held liable. They further stipulated that Harenda is an "operator" under chapter NR 447 and that the asbestos testing results from the various laboratories are "accurate within the analytical testing method that each respective laboratory utilized."

¶ 22 The circuit court granted a motion for summary judgment by the State. It determined that the State satisfied its burden of demonstrating that there was ACM under § NR 447.01(1)(a) and § NR 447.02(1)(b) and the relevant federal regulation, 40 C.F.R. Pt.

763, Subpt. E., App. E, § 1.7.2.1. The circuit court further determined that the State met its burden in showing that the ACM was stripped or removed without complying with the requirements of chapter NR 447 as alleged in the complaint.

¶ 23 Harenda appealed. The court of appeals determined that the State's interpretation of 40 C.F.R. Pt. 763, Subpt. E., App. E, § 1.7.2.1, which was based upon clarifications of the rule issued by the United States Environmental Protection Agency, was inconsistent with the plain language of § 1.7.2.1. *State v. Harenda Enterprises, Inc.*, 2006 WI App 230, ¶ 9, 297 Wis.2d 571, 724 N.W.2d 434. It therefore*32 reversed the judgment of the circuit court. The State petitioned for review.

II

[1] ¶ 24 The central issue in this case concerns the interpretation of the method used to test for asbestos-containing material (ACM) pursuant to chapter NR 447 of the Wisconsin Administrative Code. This case is before us on the circuit court's grant of summary judgment in favor of the State. We review the grant or denial of summary judgment independently, but apply the same methodology as used by the circuit court. *Wis. Mall Props., LLC v. Younkers, Inc.*, 2006 WI 95, ¶ 19, 293 Wis.2d 573, 717 N.W.2d 703 (citing *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816 (1987)). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2).

[2][3][4][5] ¶ 25 Administrative code provisions are interpreted according to principles of statutory construction.[FN6] *Orion Flight Servs., Inc. v. Basler Flight Serv.*, 2006 WI 51, ¶ 18, 290 Wis.2d 421, 714 N.W.2d 130. When an administrative code provision is ambiguous, we turn to extrinsic sources in order to determine agency intent. *Id.* An administrative agency's interpretation of its own regulations is controlling "unless the interpretation is inconsistent with the language of the regulation or is clearly erroneous." *Id.* (quoting *Bergmann v. McCaughtry*, 211 Wis.2d 1, 7, 564 N.W.2d 712 (1997)).[FN7] Whether an agency's interpretation of a regulation is inconsistent with the regulation or clearly erroneous is a question of law that we review independently of the determinations rendered by the circuit court and court of appeals. *Bergmann*, 211 Wis.2d at 8, 564 N.W.2d 712.

FN6. *See* Wis. Stat. § 227.27(1), which states:

> In construing rules, ss. 990.001, 990.01, 990.03(1), (2) and (4), 990.04 and 990.06 apply in the same manner in which they apply to statutes, except that ss. 990.001 and 990.01 do not apply if the construction would produce a result that is inconsistent with the manifest intent of the agency.

FN7. *Pfeiffer v. Board of Regents*, 110 Wis.2d 146, 154-55, 328 N.W.2d 279 (1983); *Beal v. First Federal Sav. & Loan Ass'n*, 90 Wis.2d 171, 182, 279 N.W.2d 693 (1979); *see also DaimlerChrysler v. Labor & Indus. Review*

*Comm'n*, 2007 WI 15, ¶ 11, 299 Wis.2d 1, 727 N.W.2d 311.

[6][7] ¶ 26 In addressing whether the regulation is clearly erroneous we consider the intent or purpose of the regulation. In resolving ambiguities, "[i]t is fundamental that we must favor a construction of a statute or regulation which will fulfill the intent of the statute or regulation over one which defeats its manifest object." *Baierl v. McTaggart*, 2001 WI 107, ¶ 21, 245 Wis.2d 632, 629 N.W.2d 277 citing *Shands v. Castrovinci*, 115 Wis.2d 352, 356, 340 N.W.2d 506 (1983).

[8][9] ¶ 27 It is often difficult to discern the difference between an interpretive rule and a legislative rule, as they lie upon a "hazy continuum." *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C.Cir.1987). "Determining whether a given agency action is interpretive or legislative is an extraordinarily case-specific endeavor." *Id.*; *see* Harry T. Edwards and Linda A. Elliott, *Federal Standards of Review*, 134-35. In making such a determination courts "consider the agency's own characterization of the particular action and will generally give deference to the agency's views." *Beverly Health & Rehab. Servs. v. Thompson*, 223 F.Supp.2d 73, 103 (D.D.C.2002)(quoting *American Hosp. Ass'n*, 834 F.2d at 1056 and ***33***British Caledonian Airways Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 991 (D.C.Cir.1978))(internal punctuation and citations omitted).

[10] ¶ 28 In this case we also address the issue of

whether the circuit court's judgment violated Harenda's constitutional right to substantive due process. Such an inquiry presents a question of law which we review independently. *Kenosha County Dep't of Human Servs. v. Jodie W.*, 2006 WI 93, ¶ 22, 293 Wis.2d 530, 716 N.W.2d 845.

III

A

[11] ¶ 29 Under Wis. Admin. Code § NR 447.02(1)(b), ACM is defined as material "containing more than 1% asbestos as determined using the method specified in Appendix E to Subpart E, 40 C.F.R. part 763, section 1...." [FN8] The parties agree that the provision of Appendix E, section 1 that is relevant in this case is § 1.7.2.1, "Gross Examination." The parties disagree, however, as to whether the language is clear or ambiguous. Harenda contends that § 1.7.2.1 is clear, and that the State's interpretation conflicts with the plain meaning of that section. To assess Harenda's argument, we begin by examining the language of the rule. Section 1.7.2.1 provides as follows:

> FN8.Wis. Admin. Code § NR 447.02 provides in relevant part:
>
> (1) "ACM" means asbestos-containing material.
>
> ....
>
> (b) "Category II nonfriable ACM" means any

material, excluding Category I nonfriable ACM, containing more than 1% asbestos as determined using the method specified in Appendix E to Subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized or reduced to powder by hand pressure.

*See also* Wis. Admin. Code § NR 484.04(28) (July 2007) (incorporating by reference 40 C.F.R. part 763, § 1 into § NR 447.02(1)(b)).

Bulk samples of building materials taken for the identification and quantitation of asbestos are first examined for homogeneity at low magnification with the aid of a stereomicroscope. The core sample may be examined in its container or carefully removed from the container onto a glassine transfer paper or clean glass plate. If possible, note is made of the top and bottom orientation. *When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, and then the results for each layer are combined to yield an estimate of asbestos content for the whole sample.* 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1 (emphasis added).

¶ 30 The focus of our inquiry is on the last sentence of the above rule. It describes two different types of testing measurements: (1) a quantification of asbestos fibers in each discrete layer, and (2) an "estimate of asbestos content for the whole sample" achieved by combining the results from discrete

layers. However, it is unclear which of these measurements is relevant in determining whether material is ACM.

¶ 31 The circuit court aptly describes the ambiguity in the two main clauses of the sentence, noting that they say different things:

> [I]f they can discern discrete strata, they're supposed to come up with a number for each layer. It says that in the first clause of the final sentence that I read. And then it's got a conjunction-and-which supports [Harenda's] argument, and the second clause, which says, And then you composite or come up with a total for all the layers. And the question*34 what does it mean?.... I'm going to borrow from my early life as an English teacher. There's two clauses in one sentence, and they say two different things. They don't rule each other out, either. They say two different things, and they're joined by a linking conjunction....
>
> [I]t doesn't say whether the violation occurs in both parts of the sentence, just one, or the other. It is not clear. However, I think it's significant that each half of the sentence doesn't rule the other out. And so then the question becomes, is this interim method rule ... clear? No, it's not clear. And that's pretty obvious.[FN9]
>
> FN9. *See also* *In re LVI Envtl. Servs, Inc.*, 2001 WL 988722, 10 E.A.D. 99, 106 (Envtl.App.Bd.2001)(noting lack of clarity in the text of 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1 regarding which measure constitutes

violation).

¶ 32 The second clause of the sentence reveals further ambiguity with respect to how to arrive at an "estimate of asbestos content for the whole sample." It directs that "and then the results of each layer are combined." However, it is unclear what is meant here by the word "combined." The State asserts that it is ambiguous, but posits that a reasonable interpretation is that the results are added together. Harenda maintains that "combined" means that the results are averaged.

¶ 33 The court of appeals, without explanation, concluded that "combining" the results from each layer requires that the percentage of asbestos for each layer be averaged. *Harenda Enterprises*, 297 Wis.2d 571, ¶ 4, 724 N.W.2d 434. An obvious problem with the court of appeals' and Harenda's "plain meaning" interpretation is that the word "average" cannot be found in the text of the rule.

¶ 34 Moreover, "combine" means to "bring into a state of unity; merge." *American Heritage Dictionary of the English Language*, 377 (3rd ed.1992). "Average" is defined as the "arithmetic mean." *Id.* at 127. However, "arithmetic mean" refers to the "value obtained by dividing the sum of a set of quantities by the number of quantities in the set." *Id.* at 99. Thus, averaging requires combining quantities and then dividing. The language of the rule, however, states only that quantities are to be combined.

¶ 35 Further, the language of the section leaves

unclear which layers are combined to yield an estimate of the asbestos content of the whole sample. There are two plausible interpretations. The first is that only the results from each layer in which there are asbestos fibers are combined to yield an estimate of the asbestos content of the whole sample. The second interpretation is that the results from every layer identified, including those in which no asbestos fibers are identified and quantified, are combined to yield the estimate of asbestos content for the whole sample. This appears to be the interpretation embraced by the court of appeals.

¶ 36 In light of these interpretations, we reject Harenda's contention that the text of the rule is unambiguous. It is unclear how the first clause of the relevant sentence relates to the second clause. Likewise, the meaning of the word "combine" is uncertain, and there are competing interpretations as to what layers are to be combined to yield an estimate of asbestos content. We therefore determine that the language of § 1.7.2.1 is ambiguous.

B

¶ 37 The determination that § 1.7.2.1 is ambiguous, however, does not end our inquiry. We must next examine whether the State's interpretation is inconsistent ***35** with the regulation or clearly erroneous. As we have noted, an administrative agency's interpretation of its own regulations is controlling unless the agency's interpretation is "inconsistent with the language of the regulation or is clearly erroneous." *Orion Flight Servs.*, 290 Wis.2d 421, ¶ 18, 714 N.W.2d 130.

¶ 38 The State maintains that under § 1.7.2.1, material is ACM if a single layer from a multi-layered sample contains greater than one percent asbestos. It bases its position on the interpretations advanced in two clarifications issued by the EPA in response to questions regarding the testing of multi-layered samples.

¶ 39 In the first, issued in January 1994, the EPA stated that the clarification was a response to members of the regulated community who had "frequently asked" questions regarding the analysis of multi-layered samples.

> The Agency has learned that some of the regulated community have questions concerning the analysis of samples which may contain multiple layers, any or all of which may be asbestos containing materials (ACM).... Because these questions are frequently asked, EPA is making this clarification.

59 Fed.Reg. 542 (Jan. 5, 1994).

¶ 40 The clarification provided that when multi-layered samples are tested, the results from each layer should be reported. It stated that "[i]n general, when a sample consists of two or more distinct layers or materials, each layer should be treated separately and the results reported by layer (discrete stratum)." *Id.*

¶ 41 Thus, the EPA's interpretation of § 1.7.2.1 is that the results of each layer are relevant in determining whether material is ACM. This

addresses the first ambiguity in § 1.7.2.1 that we describe above. It sheds light on the circuit court's question of "whether the violation occurs in both parts of the sentence, just one, or the other." The January 1994 statement clarifies that a violation occurs in the first part of the sentence.

¶ 42 The second clarification in which the EPA interprets its rule was issued in December 1995 in response to continued questions regarding the testing of multi-layered samples. The EPA explains in the second clarification that prior to adopting the procedures set forth in 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1, on November 20, 1990, the EPA had informal policies of treating each layer in multi-layer systems separately and against diluting asbestos-containing layers by combining them with layers not containing asbestos:

> EPA's unwritten policy based on the definition of "friable asbestos material" was that each layer in a multi-layered system was to be analyzed as a separate material (no averaging or dilution by combining layers of asbestos-containing material with nonasbestos-containing material was allowed).

60 Fed.Reg. 65,243 (Dec. 19, 1995).

¶ 43 Further, the December 1995 statement explained that the January 1994 clarification interpreted § 1.7.2.1 as precluding averaging. It states that in multi-layered systems, "results were not allowed to be combined to determine average asbestos content (continuing the policy that dilution

of an asbestos-containing material is not allowed)." *Id.*

¶ 44 The EPA's December 1995 clarification therefore provides guidance on a second ambiguity in § 1.7.2.1. "Combining" the results from discrete layers does not mean averaging the content of those layers where doing so dilutes the results.

¶ 45 The document also describes a potentially cost-saving method for testing ***36** multi-layered samples. It explains that in testing multi-layered samples, labs may composite layers first in order to determine whether it is necessary to perform potentially more costly and time-consuming testing of discrete layers:

> Any source sending multi-layered bulk samples to a lab may request that certain sample(s) or portions of sample(s) be composited for analysis first (to potentially reduce time and cost of sampling).
>
> (Note: A composite sample does not mean that multiple samples may be composited into one sample. It means that multiple layers of one core sample may be composited for analysis.)

*Id.*[FN10]

> FN10. The clarification details the procedure for analyzing composited layers.

¶ 46 The clarification then explains that if the analysis of composited layers shows that the average content of asbestos for the whole sample is greater

than one percent, the system must be treated as ACM. However, if the analysis shows the presence of asbestos, but in a concentration of less than one percent, each discrete strata must be treated separately. If a single layer is found to contain greater than one percent asbestos, then that layer must be treated as ACM.

> If the result of the composite analysis shows that the average content for the multi-layered system (across the layers) is greater than one percent, then the multi-layered system must be treated as asbestos-containing and analysis by layers is not necessary. If the result of the composite sample analysis indicates that the multi-layered system as a whole contains asbestos in the amount of one percent or less, but greater than none detected, then analysis by layers is required to ensure that no layer in the system contains greater than one percent asbestos. If any layer contains greater than one percent asbestos, that layer must be treated as asbestos-containing. This will have the effect of requiring all layers in a multi-layered system to be treated as asbestos-containing if the layers can not be separated without disturbing the asbestos-containing layer. Once any one layer is shown to have greater than one percent asbestos, further analysis of the other layers is not necessary if all the layers will be treated as asbestos-containing.

*Id.*

¶ 47 The December 1995 statement therefore reiterates the position of the January 1994 statement that the measure of asbestos content from

a single layer may render multi-layer material ACM. It also provides an opportunity to perform first a composite test in order to determine more quickly and efficiently that a sample is ACM. Notably, it does not imply that the "estimate of asbestos content for the whole sample" described in § 1.7.2.1 is an average of all layers. Rather, it clarifies that averaging may not be used to dilute the measure of asbestos content in multi-layer samples. The composite test allows averaging, but it is a separate test used to forestall the expense of analyzing individual layers and not as a means of dilution.

¶ 48 The State's argument regarding the testing method is therefore supported by the EPA's clarifications, which are not inconsistent with § 1.7.2.1. Moreover, the EPA's interpretation is not clearly erroneous, as its interpretation is supported by the purpose of regulation and basic principles of statutory construction.

¶ 49 The manifest purpose of chapter NR 447 of the Wisconsin Administrative Code, which incorporates 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1, is to *37 protect workers and the public from air pollution from asbestos. Prohibiting the dilution of ACM by averaging the asbestos content of multi-layer systems serves that purpose.[FN11]

> FN11. The dissent emphasizes the importance of "clear, understandable, enforceable testing methods" in "an area as crucial as asbestos removal." Dissent, ¶ 78. It next warns that asbestos exposure can lead to a "horrible death." *Id.*, ¶ 79.It advances that "[t]he

current testing methods and procedures are dangerously ineffective." *Id.*, ¶ 95. Finally, it claims that the clarifications "do not actually protect the worker." *Id.*, ¶ 96. Despite the dissent's purported concern for protecting the worker, and its concerns about clarity, horrible consequences, and dangerously ineffective testing methods, the dissent nevertheless opts for no meaningful regulation whatsoever.

> Instead it would leave in place an ambiguous rule. It is unclear how the State would regulate demolition of ACM if the interpretive rule is invalidated. It would appear that under the dissent's view, workers would receive no protection in the demolition materials in which some layers contain greater than one percent ACM.
>
> The dissent's reply that the majority "invalidates the substantive rule" is incorrect. *Id.*, ¶ 94 n. 14. The rule is valid, and the clarifications address its ambiguity.

¶ 50 The interpretation suggested by Harenda, and adopted by the court of appeals, runs contrary to the purpose of the rule. At oral argument, the State explained that averaging layers would allow that a layer of wall containing (for example) 1.9 percent asbestos would constitute ACM if it were standing alone, but not constitute ACM if attached to a layer of wall with no asbestos. The State explained, however, that whether the asbestos-containing layer is attached to a non-asbestos-containing layer does

not diminish the amount of asbestos that disperses into the air when a worker strikes the wall with a hammer or a wrecking ball.[FN12]

> FN12. The court of appeals rejected this argument. It determined that the argument led to the "absurd" result that a "massively thick wall with an extremely thin coat of paint" containing just over one percent asbestos could constitute ACM. *Harenda Enterprises*, 297 Wis.2d 571, ¶ 9 n. 4, 724 N.W.2d 434.It is not clear why this is an absurd result. As the State explained at oral argument, if a worker strikes the paint-covered wall with a hammer or wrecking ball, the amount of asbestos entering the air would not depend on whether the material under the paint is thick or thin. Regardless, the difficulty of making such determinations demonstrates the value of deferring to an agency's expertise in interpreting its regulations.

¶ 51 The State's and EPA's interpretation is also required in order to harmonize the language of § NR 447.02(1)(b) and § 1.7.2.1. It is a basic principle of statutory and administrative rule construction that "provisions relating to the same subject matter should be read together and harmonized when possible." *State v. Morford*, 2004 WI 5, ¶ 21, 268 Wis.2d 300, 674 N.W.2d 349.

¶ 52Section 447.02(1)(b) states that " 'Category II nonfriable ACM' means *any material* " that contains greater than one percent asbestos under § 1.7.2.1.

(Emphasis added.) Section 1.7.2.1 is explicit that where a sample contains discrete strata, "each is *treated as a separate material.*" (Emphasis added.) Reading these two provisions together, discrete strata must be treated as separate material under § 1.7.2.1, and *any* material containing greater than one percent asbestos is ACM under § NR 447.02(1)(b). It therefore follows that a discrete strata containing greater than one percent asbestos is ACM.

¶ 53 Interpreting the regulations such that a discrete strata in a multi-layer sample cannot be ACM would require that "material" have different meanings in § 1.7.2.1 and § NR 447.02(1)(b). However, it seems implausible that § NR 447.02(1)(b) uses the word "material" to ***38** mean one thing, but employs and directly refers to a test for ACM that uses "material" to mean something altogether different.

[12] ¶ 54 Harenda argues, however, that the EPA's interpretation of § 1.7.2.1 contradicts the section because it renders the second clause of the sentence (estimating the asbestos content of the entire sample) superfluous. Construction of statutes and administrative rules should avoid whenever possible interpretations that render language superfluous. *Hutson v. State Pers. Comm'n*, 2003 WI 97, ¶ 49, 263 Wis.2d 612, 665 N.W.2d 212. Harenda's argument misses the mark for two reasons.

¶ 55 First, its argument assumes that "combining" the results from discrete layers to "yield an estimate of asbestos content for the whole sample" means

averaging the results. The EPA was clear in the January 1994 and December 1995 documents that layers could not be averaged as a means to dilute layers containing greater than one percent asbestos. 59 Fed.Reg. 542 (Jan. 5, 1994); 60 Fed.Reg. 65,243 (Dec. 19, 1995). The discussion of averaging the asbestos contents for multiple layers occurs in the context of providing testers the opportunity to do a preliminary cost-and time-saving test in order to establish whether analyzing discrete layers is necessary. *Id.*

¶ 56 Second, it is Harenda's interpretation of § 1.7.2.1 that renders language superfluous. If the asbestos content of an entire multi-layer sample is the only measure relevant in determining whether material is ACM, there would be no need to treat each layer "as a separate material so that fibers are first identified and quantified in that layer only." Material could be determined ACM without analyzing discrete strata. Harenda's argument is unpersuasive.[FN13]

> FN13. The dissent states that we conclude the language in § 1.7.2.1 "is ambiguous because of the word 'combined.' " Dissent, ¶ 83. It further states that the 1994 and 1995 statements do not "clarify *the* alleged ambiguity," *id.*, ¶ 85 (emphasis added), and "*change* the analysis from a multi-layered approach to a single-layer approach." *Id.*, ¶ 88. The dissent, however, neglects a substantial portion of our analysis.
>
> As we discuss in the text, there are two

significant ambiguities in the rule. One concerns the word "combined." The other ambiguity, which was aptly described by the circuit court, is whether a violation occurs when asbestos content for discrete layers is quantified or whether a violation occurs only after the results from the discrete layers are "combined" (regardless of what "combined" means). While the dissent is correct that the clarifications do not fully explain what "combined" means, they directly address the ambiguity regarding what aspects of the test may give rise to a violation. The dissent's claim that the clarifications "do not address the alleged ambiguity" and thus "changes" the analysis is therefore mistaken.

[13][14] ¶ 57 We therefore conclude that the EPA's January 1994 and December 1995 clarifications are not inconsistent with the language of § 1.7.2.1. We also conclude that the EPA's interpretation is not clearly erroneous. The EPA's interpretation fulfills the purpose of the asbestos regulations, whereas the alternative interpretation Harenda proposes defeats that purpose. Moreover, the EPA's view is supported by basic principles of statutory construction. Giving deference to an agency's interpretation of its own rule, we conclude that the interpretation of § 1.7.2.1 explained in the EPA's January 1994 and December 1995 clarifications is controlling.[FN14]

FN14. Harenda further maintains that if § 1.7.2.1 is unclear, it is unconstitutionally vague and therefore void. However, its argument on this point is broadly stated and

not sufficiently developed. It contends that the provision is unconstitutionally vague under the test set forth in *State v. McManus*, 152 Wis.2d 113, 135, 447 N.W.2d 654 (1989). According to that test the statute or regulation must give "persons of ordinary intelligence who seek to avoid its penalties fair notice of the conduct required or prohibited," and "must provide standards for those who enforce the laws and adjudicate guilt." *Id.*

The standard Harenda cites applies to criminal statutes and regulations. See *State v. Hahn*, 221 Wis.2d 670, 677, 586 N.W.2d 5 (Ct.App.1998). However, Harenda has failed to explain why that standard should apply rather than the standard for cases involving civil penalties. *See Gross v. Woodman's Food Mkt.*, 2002 WI App 295, ¶¶ 56-57, 259 Wis.2d 181, 655 N.W.2d 718 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).

Additionally, at oral argument Harenda acknowledged that the laboratories conducting tests on its behalf were advised to use the testing methods set forth in the clarifications (i.e., the same tests used by the laboratories conducting tests for the State). It is unclear how Harenda can now argue that the regulations fail to provide fair notice and standards for enforcement when its lab was advised to use the testing method

set forth in the clarifications. Because Harenda's argument that the regulations are unconstitutionally vague is insufficiently developed, we need not address it here. *Kristi L.M. v. Dennis E.M.*, 2007 WI 85, ¶ 20 n. 7, 302 Wis.2d 185, 734 N.W.2d 375.

*39 IV

[15] ¶ 58 Harenda also argues that the clarifications impose new obligations, and absent the clarifications, there would be no basis for the State's enforcement action. It contends that the clarifications are therefore legislative rules, and that they are unenforceable because they were not enacted through the proper administrative rule making procedures pursuant to 5 U.S.C. § 553.

[16][17] ¶ 59 Under the federal Administrative Procedures Act (APA), an agency may issue a legislative rule only if it uses the note and comment procedure described in 5 U.S.C. § 553(b) or establishes an exception under 5 U.S.C. § 553(b)(3)(B). *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir.2003). However, an agency need not follow the note and comment procedure in order to issue an interpretive rule. *Id.* A legislative rule promulgated without complying with the procedures of the APA is invalid. *Id.* It is not disputed that the clarifications were issued without the procedures required to issue a legislative rule. Rather, the question is whether the clarifications are interpretive or legislative rules.

[18][19] ¶ 60 The difference between interpretive

rules and legislative rules is, roughly speaking, that interpretive rules merely explain substantive law, and legislative rules create rights, impose obligations, or effect a change in existing law. *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir.1994). A rule is legislative if, "in the absence of the rule, there would not be an adequate legislative basis for enforcement action." *Hemp Indus. Ass'n*, 333 F.3d at 1087. However, as noted above, interpretive rules and legislative rules lie upon a "hazy continuum" and distinguishing them is a case-specific endeavor. *American Hospital Ass'n*, 834 F.2d at 1045.

¶ 61 Harenda cites to a recent, unpublished case from Southern California in support of its claim that the clarifications are legislative rules. In *U.S. v. San Diego Gas & Electric Co.*, 2006 WL 3913458, 2006 LEXIS 84856 (S.D.Cal. Nov. 21, 2006) (*SDG & E* ), San Diego County sued San Diego Gas and Electric for violating asbestos work practice standards. *Id.* at 4. The county's indictment stated that the alleged ACM contained multiple layers and was tested for asbestos according to the method outlined in the clarifications. That is, ***40** the county's test would find that the material is ACM if "any of the layers, standing alone ... [contains] over 1% asbestos and [is] friable." *Id.* at 9.

¶ 62 The court determined that the "single-layer" method described in the clarifications conflicts with the test set forth in § 1.7.2.1. It interpreted the § 1.7.2.1 test to mean that "material is not regulated unless the combined result yields more than 1 percent asbestos." *Id.* at 22. The court therefore

held that the government's failure to allege that multi-layered material contained greater than one percent asbestos as determined by averaging the asbestos content of the layers was fatal to its indictment. *Id.* at 27-28.

¶ 63 The court's conclusion in *SDG & E*, however, turns on an interpretation of § 1.7.2.1 that we have rejected. As explained above, it is our determination that a reasonable interpretation of § 1.7.2.1 is that multi-layer material is ACM if a single layer has an asbestos content of greater than one percent. That interpretation is supported by EPA's clarifications, the manifest purpose of the rule, and principles of statutory construction.[FN15] Further, the *SDG & E* court uncritically adopts the view, which we reject, that in § 1.7.2.1 "combine" means average.

> FN15. Similarly, the dissent maintains that the clarifications do not apply because they have not been formally adopted by the DNR. Dissent, ¶¶ 90-91. However, the dissent's argument rests on a faulty premise. The DNR must formally adopt only legislative rules. For the reasons outlined in the text, the clarifications are interpretive rules that do not require formal adoption.

¶ 64 Moreover, § 1.7.2.1 provides an adequate basis for the enforcement action even without the clarifications. As we discuss above, § 1.7.2.1 is ambiguous, and the EPA's interpretation is consistent with the section. Specifically, § 1.7.2.1 supports the interpretation that if a single layer of a multi-layer sample contains greater than one

percent asbestos, the material is ACM. Also as outlined above, that interpretation is supported by the purpose of the regulations and basic principles of construction.

[20] ¶ 65 Finally, we are mindful that the EPA characterized the 1994 and 1995 statements as "clarifications to the final rule" rather than rules. When courts consider an agency's characterization of its actions they "generally give deference to the agency's views." *Beverly Health & Rehab.*, 223 F.Supp.2d at 103. The EPA's view supports our conclusion that the statements are interpretive rules rather than legislative rules. We therefore determine that, contrary to *SDG & E*, § 1.7.2.1 provides an adequate legislative basis for the State's enforcement action.[FN16] The clarifications are not legislative rules. Rather, they are valid interpretive rules.

> FN16. Harenda asserts that the "State admits that, without the substantive changes ... effected by the Clarifications, it loses this case ... [and] admits that it can only establish a violation if the Clarification testing method is used." At oral argument the State rejected this characterization of its view. The State's view, it explained, is that the clarifications do not effect substantive change at all. Rather, the State admits that the average asbestos content of the samples from the disputed area is less than one percent.

V

[21] ¶ 66 We turn finally to Harenda's due process argument. Harenda contends that its pre-demolition sampling and testing satisfied the applicable regulations and indicated that the material in the disputed area was not ACM. It further maintains that the differences between the results of its tests on the split samples and the State's tests on the split samples create an issue of fact as to whether the material *41 from the disputed area was ACM. Thus, it argues that the circuit court granted the State's motion for summary judgment on the basis of "conflicting test results." It maintains that the decision was therefore arbitrary, and it violated Harenda's right to due process.

¶ 67 Harenda's contention that the circuit court's decision was arbitrary is unpersuasive. Its due process argument is thus without foundation.

¶ 68 The circuit court based its decision on a four-element test as set forth in *National Can*, 126 F.Supp.2d 521:

> In order to establish liability under the asbestos NESHAP, the government must prove that 1) [American Can] was an owner or operator of a facility, 2) a renovation occurred, 3) asbestos was removed or stripped without complying with the requirements and practices delineated in the asbestos NESHAP, and 4) a jurisdictional amount of asbestos was disturbed.

*Id.* at 525, n. 1 (citing 40 C.F.R. § 61.140 et seq.)

¶ 69 Under the above test, owners and operators are

strictly liable for asbestos abatement regulation violations occurring at their regulated facilities. The State does not have to prove any negligence or intent to violate the regulation. As stated in *United States v. B & W Inv. Properties*, 38 F.3d 362 (7th Cir.1994):

> Having been deemed an owner or operator, [the defendant] has no valid challenge against application of the Act, regardless of how minimal the company's responsibilities or knowledge may actually have been. The Act imposes strict liability on all owners and operators of properties in violation of the Act.

*Id.* at 367.

¶ 70 The parties have stipulated that Harenda is an operator of a facility. There is also no dispute that a renovation occurred and that removal of material from the disputed area occurred without following the procedures outlined in chapter 447. Further, Harenda does not contest that if the material removed from the disputed area is ACM, a jurisdictional amount of asbestos was disturbed.[FN17] The issue is whether the material removed from the disputed area is ACM.

> FN17. Wisconsin Admin. Code § NR 447.06(2) establishes the amounts of ACM that trigger measures in §§ NR 447.07 and 447.08. It provides in relevant part:
>
> (2) APPLICABILITY. The requirements of ss. NR 447.07 and 447.08 apply to each owner or operator of a demolition or

renovation activity, including the removal of RACM as follows:

(a) In a facility being demolished, all the requirements of ss. NR 447.07 and 447.08 apply, except as provided in par. (c), if the combined amount of RACM meets any of the following:

1. At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components; or

2. At least one cubic meter (35 cubic feet) off of facility components where the length or area could not be measured previously.

¶ 71 Harenda is correct that the State has offered no argument that Harenda failed to conduct its pre-demolition sampling and testing according to the regulations. In fact, the State offers no opinion on the issue. Instead, the State asserts that liability does not depend on whether an owner or operator conducts pre-demolition sampling testing in accord with the regulations.

¶ 72 The State is correct. The elements set forth above do not require that the owner or operator sample or test improperly, and Harenda offers no argument that sampling and testing according to the regulations is a defense. Thus, in the present *42 case liability depends on whether the material disturbed was ACM, not on the quality of Harenda's pre-demolition sampling and testing.

¶ 73 Harenda's argument that the circuit court made an arbitrary choice between "dueling test results" is similarly unpersuasive. It makes much of the fact that the tests of the split samples conducted for the State and for Harenda had different results. Harenda contends that such "analytic variability" in testing results undermines the basis of the circuit court's decision and renders it arbitrary.

¶ 74 It is correct that Harenda's tests indicated that one more sample contained ACM than the State's test, and it is also correct that the tests differed with respect to the precise amount of asbestos in some samples. However, the samples are not "dueling" with respect to whether the material was ACM under the regulations. The tests on the split samples conducted for Harenda and the tests on the split samples conducted for the State both came back positive for ACM. Regardless of "analytic variability," the two sets of tests were consistent in the relevant respect, namely, whether the material was ACM.

¶ 75 Harenda's pre-demolition sampling and testing was the only set of tests that did not indicate that material from the disputed area was ACM. The State's test during demolition indicated that the material was ACM, and the State's test after demolition was halted indicated that the material was ACM. Further, both the State's and Harenda's tests on the split samples indicated that the material was ACM. The parties have stipulated that the tests were accurate within their testing method. Thus, the array of positive tests is sufficient to show the presence of ACM.

¶ 76 Accordingly, we determine that there was nothing arbitrary in the circuit court's conclusion that the tests showed that the material from the disputed area was ACM. Harenda therefore has no basis for a claim that the decision violated its right to due process.

VI

¶ 77 In sum, we determine, first, that the language of § 1.7.2.1 is ambiguous. Giving deference to an agency's interpretation of its own rule, we conclude that the EPA's interpretation is controlling because it is neither inconsistent with § 1.7.2.1 nor clearly erroneous. We further determine that the clarifications do not constitute impermissible rule making; rather, they are valid interpretive rules. Finally, we determine that the circuit court's judgment does not violate Harenda's substantive due process rights. We therefore reverse the court of appeals.

The decision of the court of appeals is reversed.

¶ 78ANNETTE KINGSLAND ZIEGLER, J. dissenting.

In an area as crucial as asbestos removal, it is important to have clear, understandable, enforceable testing methods. In general, clarifications may be a useful guide, but the "clarifications" in this case are inconsistent with the plain language of the rule and more than interpretive guidelines. In fact, the "clarifications" effect a substantive change rather than clarify the alleged ambiguity in the 1990 rule.

Despite the fact that the "clarifications" do not clarify the alleged ambiguity, are contrary to the promulgated rule, and were not adopted in this state, the majority still gives them the force of law. As a result, I must respectfully dissent.

I

¶ 79 Asbestos is a group of minerals that naturally occur as fibers. It has been *43 widely used in many industrial products such as flooring, textiles, and insulation.[FN1] Exposure to asbestos can lead to mesothelioma, which is a rare form of cancer that affects the protective sac of most internal organs such as the lungs. "Most people who develop mesothelioma have worked on jobs where they inhaled asbestos particles." [FN2] Symptoms, however, may not appear until 30 to 50 years after exposure. The incidence of this rare cancer has increased over the past 20 years but may be stabilizing now. Once symptoms appear and the cancer is diagnosed, the disease is often very advanced.[FN3] Mesothelioma is often associated with a horrible death.

FN1. National Cancer Institute, U.S. National Institutes of Health, *Mesothelioma: Questions and Answers, available at* http:// www. cancer. gov/ cancer topics/ factsheet/ Sites- Types/ meso thelioma.

FN2. *Id.*

FN3. American Cancer Society, *ACS: What are the Key Statistics about Malignant*

*Mesothelioma?, available at* http:// www. cancer. org/ doc root/ CRI/ content/ CRI_ 2_ 4_ 1X_ What _ are_ the_ key_ statistics_ for_ malig nant_ mesothelioma_ 29. asp? site area= , revision 10/19/06.

II

¶ 80 The Clean Air Act regulates hazardous pollutants, such as asbestos. 42 U.S.C.A. § 7412 (West 1999). The Environmental Protection Agency (EPA) enacted the National Emission Standards for Hazardous Air Pollutants (NESHAP) pursuant to its authority under § 7412. In 1973, the EPA promulgated the first asbestos NESHAP regulation. *See*38 Fed.Reg. 8,820, 8,826-30 (Apr. 6, 1973). The asbestos NESHAP specifies procedures for removing certain asbestos materials. 40 C.F.R. Pt. 61, Subpt. M, § 61.145. The 1973 regulation underwent significant changes in 1990 in order to "enhance enforcement and promote compliance with the current standard without altering the stringency of existing controls." 55 Fed.Reg. 48,406, 48,406 (Nov. 20, 1990).

¶ 81 Following the proper rule-making process, the EPA established the "Interim Method" for determining asbestos content in bulk samples.[FN4] *See id.* at 48,415; 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1, Gross Examination. The DNR incorporated by reference the 1990 testing method, but it did not so incorporate the 1994 and 1995 clarifications.[FN5] The 1990 method seems to require the following: (1) examine the core sample for homogeneity; (2) if the sample is homogeneous,

identify fibers and quantify asbestos content for the sample; (3) when discrete strata are identified, the fibers in each layer are identified and quantified; "*and then* " (4) after the layers are quantified, the results of *44 each layer are combined to yield an estimate of asbestos content for the whole sample. *See, e.g.*, *State v. Harenda Enters., Inc.*, 2006 WI App 230, ¶ 4, 297 Wis.2d 571, 724 N.W.2d 434.

FN4. Section 1.7.2.1, Gross Examination, provides:

> Bulk samples of building materials taken for the identification and quantitation of asbestos are first examined for homogeneity at low magnification with the aid of a stereomicroscope. The core sample may be examined in its container or carefully removed from the container onto a glassine transfer paper or clean glass plate. If possible, note is made of the top and bottom orientation. When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, *and then* the results for each layer are *combined to yield* an estimate of *asbestos content* for the *whole sample.*
>
> 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1. (Emphasis added.)

FN5. The 1990 testing method, unlike the clarifications, was incorporated by reference on December 4, 1994. *See*Wis. Admin. Code §

NR 484.04(28) (July 2007) (incorporating by reference 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1 for §§ NR 447.02(1)(a) and (b), 447.02(16), 447.02(27), 447.02(36), 447.09(1)(a) and(b)(intro)).

¶ 82 The plain language of the 1990 rule is instructive. It does not stop at the analysis of each layer. It reads: "*and then* the results for each layer are combined to yield an estimate of asbestos content for the whole sample." (Emphasis added.) If the rule was intended to require removal when any one layer was over one percent, the rule would not need the last clause, which requires that layers be combined to yield a result for the whole sample.

¶ 83 The majority, however, concludes that the language in § 1.7.2.1 is ambiguous because of the word "combined." *See* majority op., ¶¶ 29-36. As a result, the majority relies on the 1994 and 1995 EPA clarifications, which undermine the plain language of the properly promulgated 1990 rule.[FN6] The majority accepts the two EPA "clarifications" even though they do not have the force of law, are contrary to the plain language of the rule, and read the "combined" requirement out of existence. *See* majority op., ¶¶ 38-49. Because the clarifications (1) do not clarify the ambiguity; (2) were not properly promulgated and are not the law of this state; and (3) fail to fully protect the worker, I must dissent.

FN6. The majority defers to the agency's interpretation stating, "[a]n administrative agency's interpretation of its own regulations is controlling 'unless the interpretation is

inconsistent with the language of the regulation or is clearly erroneous.' "*See* majority op., ¶ 25 citing *Orion Flight Servs., Inc. v. Basler Flight Serv.*, 2006 WI 51, 290 Wis.2d 421, 714 N.W.2d 130. Because the agency's interpretation is inconsistent with the properly promulgated rule, I give no deference to the agency's interpretation. *See* part B of this dissent. However, as the court of appeals so aptly stated, "[i]rrespective of what level of deference is appropriate, [ ] an agency interpretation may not trump a statute's clear language." *State v. Harenda Enters., Inc.*, 2006 WI App 230, ¶¶ 8-9, 297 Wis.2d 571, 724 N.W.2d 434.

A

¶ 84 Even if we look to the 1994 and 1995 clarifications and ignore the fact that the DNR did not adopt the clarifications but adopted only the 1990 rule, the clarifications still do not clarify the alleged ambiguity of what "combined" means. In 1994 and 1995, the EPA produced "clarifications" for the 1990 rule. The January 5, 1994, clarification briefly explained, "when a sample consists of two or more distinct layers or materials, each layer should be treated separately and the results reported by layer (discrete stratum)." 59 Fed.Reg. 542 (Jan. 5, 1994). Even if this is an explanation, it still fails to explain what actions should be taken to combine layers to yield an estimate for the whole sample.

¶ 85 To add to the confusion, the second clarification, issued in 1995, states that combining layers was

never allowed. That contention, however, is clearly contrary to the plain language of the rule. The 1995 clarification states that the "unwritten policy" of the EPA dating back to the 1970s "was that each layer in a multi-layered system was to be analyzed as a separate material (no averaging or dilution by combining layers of asbestos-containing material with nonasbestos-containing material was allowed)." 60 Fed.Reg. 65,243 (Dec. 19, 1995). While this new test-the single layer approach-may be a better approach, it is contrary to the 1990 rule's plain language. Rather than clarify the alleged ambiguity, the clarifications create a new and distinct rule.

B

¶ 86 Under our system of government, any enforceable rule, however, must be *45 vetted through the proper rule-making process. The rule-making process is an important part of our democracy. It gives interested parties the opportunity to be heard. The Administrative Procedures Act governs the promulgation of new federal agency rules, 5 U.S.C.A. § 553, and chapter 227 of the Wisconsin Statutes governs the promulgation of Wisconsin agency rules. Rules must be subjected to a notice and comment period before they may take effect. 5 U.S.C.A. § 553(b) and (c); Wis. Stat. §§ 227.16-227.19. The notice and comment period occurred at the state and federal level for the 1990 rule, but it never occurred with respect to the 1994 and 1995 clarifications. Because the clarifications effect substantive change and create a new rule, the rule-making process was required.

¶ 87 When a rule is interpretive rather than substantive, the rule is excepted from the notice and comment period requirements. 5 U.S.C.A. § 553(c). Whether a rule is substantive rather than interpretive, however, depends upon whether it creates rights, assigns duties, or imposes new obligations. *See Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1087 (9th Cir.2003) (concluding (1) that a legislative or substantive rule promulgated without following the rule-making requirements is invalid; and (2) that a rule is legislative or substantive if it imposes new obligations or changes existing law).[FN7]

> FN7.*See also Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir.1994) (discussing the difference between interpretive and legislative rules); Elizabeth Williams, *What constitutes "interpretative rule" of agency so as to exempt such action from notice requirements of Administrative Procedure Act 5 USCS § 553(b)(3)(A)*, 126 A.L.R. Fed. 347 (1995).

¶ 88 Here, there can be no question that the 1994 and 1995 clarifications effect a substantive change to the law, impose new obligations on companies such as Harenda, and create significant civil or criminal liability. The "clarifications" change the analysis from a multi-layered approach to a single-layer approach. This changes the rule-without following proper rule-making procedures-because instead of a quantity of asbestos for the whole sample giving rise to an obligation for special removal procedures, a

company, such as Harenda, must follow special removal procedures when only one layer out of many contains greater than one percent asbestos. Because the clarifications impose new obligations upon companies such as Harenda, the clarifications change the rules governing asbestos testing.[FN8] In fact, the State seems to concede that the clarifications ***46** change the rule; the State admits that it cannot meet its burden of proof if the clarifications are not the law.[FN9] Thus, the clarifications substantively change the rules governing asbestos testing.

> FN8. *See, e.g.*, Robert M. Howard, Patricia Guerrero, David B. McGrath, Drew R. Van Orden, *The EPA's Prosecution of Clean Air Act Asbestos NESHAP Cases Based Upon Non-binding Bulk Material Test Methods*, 44 San Diego L.Rev. 173, 202-03 (2007) (identifying five substantive differences between the 1990 and 1993 test methods: (1) averaging of multilayered material, which has been through federal rulemaking three times, is rejected by the 1993 test method; (2) the 1990 rule "mandates 'representative,' multilayered samples to quantify asbestos content layer-by-layer" instead of material becoming regulated if any single layer is greater than one-percent asbestos; (3) changing the "small quantity" criteria for pipe wrap; (4) unlike the 1993 test method, the 1990 "method makes no laboratory determination of friability, as a predictor of the material's actual condition in the field"; (5) "[u]nlike the 1990 test method, the newer 1993 test method requires

laboratories to report on friability as that term is separately defined" in the new test method). The 1993 method, which this article refers to, is the method discussed in the clarifications. *See id.* at 182-86 (referring to R.L. Perkins & B.W. Harvey, *Test Method, Method for the Determination of Asbestos in Bulk Building Materials,* U.S. Envtl. Prot. Agency, EPA/600/R-93/116 (1993)).

FN9. At the summary judgment hearing, the State said:

> Then, question number 2 is whether or not the clarifications apply. Again, every test result that the State submitted were-used the clarification method. Every one. Why? Because they were all certified labs. And all certified labs under the NVLAP procedures have to follow the clarifications. They were all analyzed by layer. *I'm first to admit that if you throw out the clarifications, you throw out the State's test results.* Every one was analyzed I believe under the NVLAP approach. And so this is obviously a pivotal aspect.
>
> (Emphasis added.)

¶ 89 The EPA even acknowledged its responsibility to promulgate a new rule so that it could properly enforce the new test. The 1995 clarification itself states that with regard to the composite analysis method, the "EPA intends to amend the asbestos NESHAP in the near future to refer specifically to

these procedures." 60 Fed.Reg. 65,243 (Dec. 19, 1995). However, the EPA never took that action.

¶ 90 The 1995 clarification devised an alternative cost-saving test method, which allows one to have the composite analyzed first. *Id.* If the "composite analysis shows that the *average content* for the multi-layered" sample is over one percent, then the material must be treated as asbestos containing (ACM). *Id.* (Emphasis added.) FN10 However, if the composite analysis yields asbestos below one percent but greater than zero, then analysis by layers is required to ensure that no layer is greater than one percent asbestos content, which would deem that layer an asbestos containing layer giving rise to precautionary measures for the entire sample without combining. *Id.* Thus, under this clarification, if one layer is greater than one percent, the entire sample is considered ACM. This, however, is contrary to the language of the 1990 promulgated rule, and the DNR never adopted the clarifications. As acknowledged by the EPA, new action is required to promulgate the 1995 testing method.

> FN10. Presumably, this "averaging" arises out of the last sentence in § 1.7.2.1, Gross Examination. The 1995 clarification, thus, appears to try and utilize "combine" from § 1.7.2.1.

¶ 91 As we see in this case, the clarifications have been enforced by the DNR as if they have the force of a properly promulgated rule, despite the fact that our state did not incorporate by reference the clarifications FN11 and they effect a substantive

change to the rule. While an agency may interpret rules, they cannot effect a new rule that changes the substantive rule. In effect, new rules governing asbestos testing, which could result in civil or criminal penalties, have been imposed without following proper rule-making procedures. *See* *United States v. San Diego Gas & Elec. Co.*, No. 06-CR-65-DMS, 2006 WL 3913457, at *6-8 (S.D.Cal. Nov.21, 2006) (concluding that the clarifications are legislative**47** and thus impose new obligations on companies even though the proper rule-making process was not followed; therefore, a company cannot be held liable based on testing methods articulated by the clarifications).

> FN11. In 1994, the DNR incorporated by reference the federal 1990 rule. *See*Wis. Admin. Code § NR 484.04(28) (incorporating only 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1, which does not include the "clarifications"). The clarifications have never been incorporated by reference. Moreover, the 1994 clarification was in place when the DNR incorporated the 1990 rule by reference. If the DNR wanted to adopt the clarification it could have taken action in 1994 or at a later time. *Cf.*Wis. Admin. Code § NR 484.04*with*Wis. Admin. Code § NR 352.03 (incorporating by reference "[a]ll of the following federal manual, memoranda, guidelines, regulatory guidance letters or other provision established by the U.S. Army Corps of Engineers interpreting the 1987 wetlands delineation manual shall be used when delineating nonfederal wetland boundaries").

¶ 92 Proper rule making is important because matters are openly debated and people have the opportunity to be heard. It is fundamentally unfair to subject anyone to significant liability-especially criminal liability-when proper rule making did not occur. Here, Harenda was exposed to $4 million in liability.[FN12]If the State intends to hold people or companies liable-potentially criminally liable-the rules must be properly enacted.[FN13] Furthermore, it runs counter to our system of justice to hold anyone civilly liable, and especially criminally liable, when the proper testing method is ambiguous as the majority claims.

FN12. Violations are contrary to Wis. Admin. Code §§ NR 447.08(6)(a), 447.08(6)(b), 447.08(1), and 447.13(1). Potential penalties for violations of asbestos regulations are provided in § NR 447.19, Penalties; it reads:

> (1) The department may take appropriate enforcement action against any owner or operator of a demolition or renovation activity or any owner or operator of an active landfill, to which this chapter applies, that violates this chapter. Appropriate enforcement action includes letters of non-compliance, notices of violation, citations, referrals to the Wisconsin department of justice, and deferral or referrals to the United States environmental protection agency. Any enforcement action the department may take shall be based upon factors such as severity, duration, frequency

and environmental or health risks of the violation.

....

(3) A citation may be issued which requires a forfeiture of not less than $500, nor more than $5,000, for each violation, except as provided in sub. (4). Each day of continued violation is a separate offense.

(4) When any owner or operator is found in violation of the regulatory requirements listed in sub. (2) by any court of this state, and the violation remains of record and unreversed, for any second or subsequent violation of the regulatory requirements listed in sub. (2) occurring within a 5-year period from the date of the prior adjudication, the minimum and maximum citation forfeitures shall be doubled.

FN13.*See*Wis. Stat. § 285.87, Penalties for violations relating to air pollution (asserting criminal penalties for violations of ch. 285 of the Wisconsin Statutes or any rule promulgated under ch. 285).Wis. Admin. Code ch. NR 447 was adopted under Wis. Stat. §§ 285.11, 285.13, 285.17 and 285.27. Wis. Stat. § 285.87 reads:

(1) Except as provided in §§ 285.57(5) or 285.59(8), any person who violates this chapter or any rule promulgated, any permit issued or any special order issued under this

> chapter shall forfeit not less than $10 or more than $25,000 for each violation. Each day of continued violation is a separate offense.
>
> (2)(a) Except as provided in par. (b), any person who intentionally commits an act that violates, or fails to perform an act required by this chapter, except § 285.59, or any rule promulgated, any permit issued or any special order issued under this chapter, except § 285.59, shall be fined not more than $25,000 per day of violation or imprisoned for not more than 6 months or both.
>
> (b) If the conviction under par. (a) is for a violation committed after another conviction under par. (a), the person is guilty of a Class I felony, except that, notwithstanding the maximum fine specified in § 939.50(3)(i), the person may be fined not more than $50,000 per day of violation.

¶ 93 The rule of lenity must be considered. While the case at hand is a civil action, our interpretation of the rule will affect those who are subject to criminal prosecution for "asbestos violations." The rule of lenity provides "that ambiguous penal statutes should be interpreted in favor of the defendant." *State v. Cole*, 2003 WI 59, ¶ 67, 262 Wis.2d 167, 663 N.W.2d 700. "More specifically, the rule of lenity comes into play after two conditions***48** are met: (1) the penal statute is ambiguous; and (2) we are unable to clarify the intent of the legislature by resort to legislative history." *Id.* The majority

concludes that the rule is ambiguous and thus the first prong is satisfied. Perhaps the clarifications could be utilized under the second prong to ascertain the intent of the EPA, but when the legislative history or "clarifications" change the substantive rule's plain language, we cannot rely on it to uphold liability.

¶ 94 Here, the clarifications do not merely explain substantive law. Rather, they impose new obligations by changing existing law. Thus, the clarifications introduce substantive changes in the law without following the proper rule-making procedures.[FN14]

FN14. The majority claims the dissent leaves the State of Wisconsin without any meaningful regulation, and it claims the dissent would invalidate the interpretive rule. *See* majority op., ¶ 49 n. 11. The majority, however, invalidates the substantive rule. Here, the clarifications, i.e., the "interpretive rule," so change the plain language of the rule that the clarifications are not entitled to the force of law unless they are properly promulgated. The properly promulgated 1990 rule, which the State of Wisconsin has incorporated by reference, is the only valid rule governing asbestos testing.

C

¶ 95 The current testing methods and procedures are dangerously ineffective. Harenda and the DNR both had testing completed under the clarifications

method, yet they still acquired different results. Not only were the results different pre-and post-demolition, but the tests conducted post-demolition produced competing results. Harenda's pre-demolition samples did not give rise to special precautions. Post-demolition samples, however, which were divided and given to both Harenda and the State, were not consistent with each other although both results would have required ACM precautions. When the same test yields different results, even on the same sample area, how does a court resolve these competing facts at summary judgment?

¶ 96 While the DNR argues that the clarifications result in safer working conditions, they still do not actually protect the worker. Although this court cannot require it, our federal and state government should consider implementing guidelines that actually protect the worker, such as requiring state authorities to conduct testing prior to demolition. If the clarifications are "adopted" by this court, then the DNR should act to *properly* adopt them. For example, the State of New Jersey enacted "emergency rules" for the sole purpose of adopting the clarifications. *See* Robert M. Howard, Patricia Guerrero, David B. McGrath, Drew R. Van Orden, *The EPA's Prosecution of Clean Air Act Asbestos NESHAP Cases Based Upon Non-binding Bulk Material Test Methods*, 44 San Diego L.Rev. 173, 207-08 (2007). "New Jersey explained that the 1993 test [i.e., the 1994 clarification] method is preferable to the 1990 test method because the enumerated NESHAP 1990 test method under reports asbestos content...."*Id.* at 208. Our state has not so acted.

## III

¶ 97 The "clarifications" do not clarify the 1990 rule. The 1994 clarification promotes a single-layer test, which is not the test articulated in the properly enacted rule. The 1995 clarification confuses the issue even more. The clarifications do not clarify what "combined" means. Moreover, the clarifications are inconsistent with the plain language of the rule and are more than interpretive guidelines. In fact, they effect a substantive change. The *49 clarifications and the majority's interpretation eliminate the last clause of the rule even though the clarifications have not been subjected to the proper rule-making process. The government should be required to clearly articulate and enact the lawful test in order to ensure that citizens are not exposed to asbestos and put companies on notice about potentially, significant liability for a violation of the "properly enacted rule."

¶ 98 Here, neither the EPA nor the DNR properly promulgated the clarifications. The clarifications effected a substantive change to the "Interim Method," and they are not the law of this state. In the case at issue, the State's motion for summary judgment should not have been granted.

¶ 99 For the foregoing reasons, I respectfully dissent.

¶ 100 I am authorized to state that Justices DAVID T. PROSSER and PATIENCE DRAKE ROGGENSACK join this dissent.
Wis.,2008.

State v. Harenda Enterprises, Inc.
746 N.W.2d 25, 2008 WI 16

# DOCUMENT 2

(Cite as: 724 N.W.2d 434)
State v. Harenda Enterprises, Inc.
Wis.App.,2006.

Court of Appeals of Wisconsin.
STATE of Wisconsin, Plaintiff-Respondent,

Petition for review filed.
v.
HARENDA ENTERPRISES, INC., Defendant-Appellant.
No. 2005AP1829.

Oral Argument Oct. 3, 2006.
Opinion Filed Oct. 31, 2006.

(Cite as: 724 N.W.2d 434)
State v. Harenda Enterprises, Inc.
Wis.App.,2006.

Court of Appeals of Wisconsin.
STATE of Wisconsin, Plaintiff-Respondent,

Petition for review filed.
v.
HARENDA ENTERPRISES, INC., Defendant-Appellant.
No. 2005AP1829.

Oral Argument Oct. 3, 2006.
Opinion Filed Oct. 31, 2006.

On behalf of the defendant-appellant, the cause was submitted on the briefs of Mark W. Rattan of Litchfield Cavo, of Brookfield, WI.
On behalf of the plaintiff-respondent, the cause was submitted on the brief of Peggy A. Lautenschlager, Attorney General, and Jeffrey M. Gabrysiak, Assistant Attorney General.

Before WEDEMEYER, P.J., FINE and KESSLER, JJ.
1 FINE, J.
Harenda Enterprises, Inc., appeals the trial court's grant of summary judgment to the State of Wisconsin imposing environmental penalties and ancillary surcharges in connection with Harenda's inspection of asbestos at the Milwaukee Auditorium

under a contract with the Wisconsin Center District's renovation of the Auditorium. *See* Wis. Stat. § 285.87 (air-pollution penalties). The crux of this appeal turns on the language of the applicable federal regulation, adopted by the State, and whether Harenda's testing for asbestos contamination at what the trial court referred to in its order as "an area of the Auditorium identified as the second floor bowl area" complied with that regulation. We conclude that Harenda's testing for asbestos contamination complied with the law, and, accordingly, reverse.

## I.

2 Under rules promulgated by the Wisconsin Department of Natural Resources pursuant to authority granted to it by Wis. Stat. § 285.11(1), *see also* Wis. Admin. Code § NR 447.01, "asbestos-containing material" is defined, as pertinent to our discussion and for the Auditorium area under consideration, as a substance "containing more than 1% asbestos as determined using the method specified in Appendix E to Subpart E, 40 CFR part 763, section 1." Wis. Admin. Code § NR 447.02(1)(b); *see also* Wis. Admin. Code § NR 484.01 (incorporating federal regulations when those regulations are referred ***436** to in the rules issued by the Department of Natural Resources set out in, as pertinent here, Wis. Admin. Code ch. NR 447); Wis. Admin. Code § NR 484.04 (incorporating by reference 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1 in, among other rules, § NR 447.02(1)(b)). If asbestos might be released into the air by demolition

or remodeling, asbestos exceeding the one-percent limit is characterized by the Department rule as "[r]egulated asbestos-containing material," § NR 447.02(33)(d), and precautions preventing or mitigating such release must be taken, Wis. Admin. Code § NR 447.08. The State charged Harenda Enterprises in this case with relying on the wrong method of assessing the asbestos content of parts of the Auditorium's second-floor-bowl area, so that the necessary precautions were not taken.

3 As we have seen in the previous paragraph, the Wisconsin Department of Natural Resources adopted 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1 as the way to determine the asbestos content of material pertinent to our discussion. The significant part of that regulation, which the parties agree applies to this appeal, provides:

Bulk samples of building materials taken for the identification and quantitation of asbestos are first examined for homogeneity at low magnification with the aid of a stereomicroscope. The core sample may be examined in its container or carefully removed from the container onto a glassine transfer paper or clean glass plate. If possible, note is made of the top and bottom orientation. When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, and *then the results for each layer are combined to yield an estimate of asbestos content for the whole sample.*[FN1]

FN1. The word "estimate" is an apparent

> reference to the inability to assure absolute consistency between the assessment made by different examiners of asbestos content in a sample. At oral argument, counsel for the State referred to this inability as "analytical variability," albeit in a context not specifically tied to the word "estimate" in 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1.

40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1 (emphasis and footnote added).

4 Broken into its parts as pertinent to this appeal, 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1 establishes the following testing procedure:
(1) The building materials are first examined to see if they are homogenous.
(2) If, on that examination the examiner sees that the material is made up of "discrete strata," the examiner must treat each stratum as "a separate material."
(3) Each discrete stratum "separate material" is examined and the "fibers are first identified and quantified in that layer only."
(4) Once the step in (3) is finished for all the strata, "the results for each layer are combined to yield an estimate of asbestos content for the whole sample."

Thus, for example, if the material under analysis has three "discrete strata" and the first layer has no asbestos, the second layer has asbestos of two-percent, and the third layer has asbestos of one-half of one percent, the parties agree that, unless the "clarifications" are thrown into the mix, the "asbestos content for the whole sample" is less than

one-percent.[FN2]

FN2. Neither of the parties refers us to a rule or regulation that explains whether the combining of the asbestos content of each separate layer "to yield an estimate of asbestos content for the whole sample" is done in reference to the mass, weight, or volume of each layer. Accordingly, we apply the one-percent threshold without further refinement, as do the parties.

*437 5 The State contends that 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1 cannot be looked at in a vacuum, but, rather, that we must also consider what everyone refers to as "clarifications" that were issued by the United States Environmental Protection Agency. Harenda, on the other hand, argues that § 1.7.2.1 is clear on its face, that the "clarifications" contradict the regulation's unambiguous language, and because, as conceded by the State, the "clarifications" were never adopted by either the federal government or the State pursuant to established rule-making procedures, § 1.7.2.1 must be applied as it is written without resort to the "clarifications," to which we now turn.

6 On January 5, 1994, the Environmental Protection Agency published in the Federal Register what it called a "clarification" that it said it "intended solely as guidance" and which did "not represent an action subject to judicial review under the section 307(b) of the Clean Air Act or section 704 of the Administrative Procedure Act." [FN3] 59

Fed.Reg. 542. As pertinent here, that "guidance" suggested the following in connection with the "analysis of multi-layered samples" for asbestos: "In general, when a sample consists of two or more distinct layers or materials, each layer should be treated separately and the results reported by layer (discrete stratum)." *Ibid.* It did not explain what the hedge-phrase "[i]n general" meant.

> FN3. Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), deals with the promulgation by the Administrator of the Environmental Protection Agency of standards or requirements and judicial review. Section 704 of the Administrative Procedure Act, 5 U.S.C. § 704, provides for judicial review of agency action.

7 The Agency issued another "clarification" on December 19, 1995, "to address common questions regarding situations where one or more layers which may contain asbestos are present, and supplement the January 5, 1994 Federal Register clarification (59 FR 542)." 60 Fed.Reg. 65,243. It reiterated, as pertinent here, that under 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1, with exceptions not at issue here, "all multi-layered systems ... must be analyzed as separate materials, and results were not allowed to be combined to determine average asbestos content (continuing the policy that dilution of an asbestos-containing material is not allowed)." 60 Fed.Reg. 65,243. It further explained:

If the result of the composite analysis shows that the average content for the multi-layered system (across

the layers) is greater than one percent, then the multi-layered system must be treated as asbestos-containing and analysis by layers is not necessary. If the result of the composite sample analysis indicates that the multi-layered system as a whole contains asbestos in the amount of one percent or less, but greater than none detected, then analysis by layers is required to ensure that no layer in the system contains greater than one percent asbestos. If any layer contains greater than one percent asbestos, that layer must be treated as asbestos-containing. This will have the effect of requiring all layers in a multi-layered system to be treated as asbestos-containing if the layers can not [*sic* ] be separated without disturbing the asbestos-containing layer. Once any one layer is shown to have greater than one percent asbestos, further analysis of the other layers is not necessary if all the layers will be treated as asbestos-containing.

***438** *Ibid.* Without application of the "clarifications," the State concedes that a sample from a multi-layered wall would pass asbestos-content muster if the asbestos-content of each layer averaged together was below the applicable limit even though one or more of the layers has an asbestos content greater than that limit. If the "clarifications" are applied, the multi-layered wall would exceed the applicable limit if any of the layers exceeded that limit. The trial court applied the "clarifications" to interpret 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1, and granted summary judgment to the State.

## II.

[1][2][3][4][5][6] 8 Our review of a trial court's grant of summary judgment is *de novo*. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315-317, 401 N.W.2d 816, 820-821 (1987). In assessing an administrative agency's interpretation of the statutes it enforces, we give it varying degrees of deference, depending on the agency's experience and expertise in implementing and applying those statutes. *See UFE Inc. v. Labor & Indus. Review Comm'n*, 201 Wis.2d 274, 284-287, 548 N.W.2d 57, 61-63 (1996) (discussing the three levels of deference given to an agency interpretation of a statute within its purview: "great weight deference, due weight deference and de novo review"). Irrespective of what level of deference is appropriate, however, an agency interpretation may not trump a statute's clear language. *See id.*, 201 Wis.2d at 282 n. 2, 548 N.W.2d at 60 n. 2 ("The plain meaning of a statute takes precedence over all extrinsic sources and rules of construction, including agency interpretations. For example, even if an agency interpretation is accorded the highest level of deference by a court, great weight, it will not be upheld if the interpretation directly contravenes the clear meaning of the statute."). Similar considerations apply to an agency's interpretation of an administrative rule or regulation. *Orion Flight Services, Inc. v. Basler Flight Serv.*, 2006 WI 51, 18, 290 Wis.2d 421, 435, 714 N.W.2d 130, 136-137:

The interpretation of an administrative code provision is "a question of law subject to independent appellate review." Interpretations of code provisions, and the determination as to whether the

provision in question is consistent with the applicable statute, are subject to principles of statutory construction. If a rule is ambiguous, we may resort to extrinsic aids to determine agency intent. In resolving the ambiguity, this court gives deference to an agency's settled "interpretation and application of its own administrative regulations unless the interpretation is inconsistent with the language of the regulation or is clearly erroneous."

(Quoted sources, internal citations, and footnote omitted.)

[7] 9 In this case, the Wisconsin Department of Natural Resources applied the "clarifications" of 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1 disseminated by the United States Environmental Protection Agency. Additionally, the State points to a determination by the Environmental Protection Agency Environmental Appeals Board upholding, without independent analysis, a hearing officer's determination that the "clarifications" were applicable even though it also opined that the "language" of § 1.7.2.1 "appears to provide some support for" an interpretation contrary to those "clarifications." *In re LVI Envtl. Servs., Inc.*, 10 E.A.D. 99, 106, 2001 WL 988722 (Envtl.App.Bd.2001), *available at* http:// www. epa. gov/ eab/ disk 11/ lvi. pdf. The "clarifications" are, however, at odds with the clear command of § 1.7.2.1 that the asbestos content for each separate layer***439** in a sample be "combined to yield an estimate of asbestos content for the whole sample." Thus, whatever deference we owe to the Environmental Protection Agency or to the

Department of Natural Resources, their interpretation of § 1.7.2.1 is at odds with what the section plainly says. Accordingly, we reverse the trial court's grant of summary judgment to the State.[FN4]

FN4. While conceding that it cannot prevail unless the "clarifications" apply, the State argues that to ignore the "clarifications" ignores what the drafters of 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1 intended all along. But, "[o]urs is 'a government of laws not men,' and 'it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.' " *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 52, 271 Wis.2d 633, 667, 681 N.W.2d 110, 126 (quoted source omitted). The State also contends that ignoring the "clarifications" leads to what it calls an "absurd result" of not requiring asbestos-abatement procedures when the sample as a whole exceeds the one-percent threshold but no separate layer does. This is how the State crystallizes that argument in its brief on appeal:

For example, if a building that was to be demolished was constructed of walls that were made of 12 inches of styrofoam insulation covered by 1/4 inch of plaster that was 5% asbestos, under Harenda's interpretation of [§ 1.7.2.1], the removal of the material, even

though obviously dangerous, would not be subject to Wis. Admin. Code ch. NR 447 safety protections.

That result might, however, be avoided if the asbestos sampling and assessment were tied to mass, weight, or area. See footnote 2, above, pointing out that neither of the parties here has argued that anything but the base percentages should be considered. Moreover, the opposite of the State's hypothetical might also attend and be equally "absurd."

For example, assume a massively thick wall with an extremely thin coat of paint. The massive wall-structure has no asbestos, but the asbestos level in the paint coat is barely more than the one-percent threshold. Under the "clarifications," especially the 1995 "clarification," the entire wall-structure would be "regulated asbestos-containing material" requiring abatement procedures even though the percentage of asbestos in the wall-structure as a whole (including the paint layer) is miniscule. All this reaffirms why the State's concerns, and the consequences of any changes to 40 C.F.R. Pt. 763, Subpt. E, App. E, § 1.7.2.1, must be addressed by either statute or an administrative rule adopted properly with all the attaching safeguards of notice and opportunity for public comment. *See* 5 U.S.C. § 553 (rule-making by federal agencies); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969) ("The rule-making provisions of that Act [the Administrative Procedure Act], which the Board would avoid, were designed

to assure fairness and mature consideration of rules of general application.") (Fortas, J., announcing judgment of the Court); Wis. Stat. § § 227.10-227.30 (rule-making by Wisconsin administrative agencies).

Judgment reversed.

Wis.App.,2006.
State v. Harenda Enterprises, Inc.
724 N.W.2d 434, 2006 WI App 230

END OF DOCUMENT

# DOCUMENT 3

**Order of Supreme Court of Wisconsin Denying Motion For Reconsideration**

**June 11, 2008**

Office of the Clerk
Supreme Court of Wisconsin
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688
Telephone (608) 266-1880
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

June 11, 2008

To:
Hon. Kitty K. Brennan
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room G-8
901 N. 9th Street
Milwaukee, WI 53233

Jeffrey M. Gabrysiak
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Mark W. Rattan
Litchfield Cavo, LLP
13400 Bishop's Lane, Suite 290
Brookfield, WI 53005

You are hereby notified that the Court has entered the following order:

2005AP001829 State v. Harenda Enterprises, Inc.

The court having considered the motion for reconsideration filed by Harenda Enterprises, Inc.,

IT IS ORDERED that the motion for reconsideration is denied, without costs. Prosser, Roggensack, and Ziegler, JJ., dissent.

David R. Schanker
Clerk of Supreme Court

# DOCUMENT 4

## 28 U.S.C. §1257

28 U.S.C. § 1257. State courts; certiorari

**(a)** Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

**(b)** For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

# DOCUMENT 5

## Title 40: Protection of Environment

## Part 61 - National Emission Standards For Hazardous Air Pollutants

## Subpart M—National Emission Standard for Asbestos

## Title 40: Protection of Environment

## Part 61 - National Emission Standards For Hazardous Air Pollutants

## Subpart M—National Emission Standard for Asbestos

### § 61.140 Applicability.

The provisions of this subpart are applicable to those sources specified in §§61.142 through 61.151, 61.154, and 61.155.

### § 61.141 Definitions.

All terms that are used in this subpart and are not defined below are given the same meaning as in the Act and in subpart A of this part.

*Active waste disposal site* means any disposal site other than an inactive site.

*Adequately wet* means sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

*Asbestos* means the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite.

*Asbestos-containing waste materials* means mill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of this subpart. This term includes filters from control devices, friable asbestos waste material, and bags or other similar packaging contaminated with commercial asbestos. As applied to demolition and renovation operations, this term also includes regulated asbestos-containing material waste and materials contaminated with asbestos including disposable equipment and clothing.

*Asbestos mill* means any facility engaged in converting, or in any intermediate step in converting, asbestos ore into commercial asbestos. Outside storage of asbestos material is not considered a part of the asbestos mill.

*Asbestos tailings* means any solid waste that contains asbestos and is a product of asbestos mining or milling operations.

*Asbestos waste from control devices* means any waste material that contains asbestos and is collected by a pollution control device.

*Category I nonfriable asbestos-containing material (ACM)* means asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy.

*Category II nonfriable ACM* means any material, excluding Category I nonfriable ACM, containing more than 1 percent asbestos as determined using the methods specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

*Commercial asbestos* means any material containing asbestos that is extracted from ore and has value because of its asbestos content.

*Cutting* means to penetrate with a sharp-edged instrument and includes sawing, but does not include shearing, slicing, or punching.

*Demolition* means the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility.

*Emergency renovation operation* means a renovation operation that was not planned but results from a sudden, unexpected event that, if not immediately attended to, presents a safety or public health hazard, is necessary to protect equipment from damage, or is necessary to avoid imposing an unreasonable financial burden. This term includes operations necessitated by nonroutine failures of equipment.

*Fabricating* means any processing ( *e.g.*, cutting, sawing, drilling) of a manufactured product that contains commercial asbestos, with the exception of processing at temporary sites (field fabricating) for

the construction or restoration of facilities. In the case of friction products, fabricating includes bonding, debonding, grinding, sawing, drilling, or other similar operations performed as part of fabricating.

*Facility* means any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units); any ship; and any active or inactive waste disposal site. For purposes of this definition, any building, structure, or installation that contains a loft used as a dwelling is not considered a residential structure, installation, or building. Any structure, installation or building that was previously subject to this subpart is not excluded, regardless of its current use or function.

*Facility component* means any part of a facility including equipment.

*Friable asbestos material* means any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy, that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure. If the asbestos content is less than 10 percent as determined by a method other than point counting by polarized light microscopy (PLM), verify the asbestos content by point counting using PLM.

*Fugitive source* means any source of emissions not controlled by an air pollution control device.
*Glove bag* means a sealed compartment with attached inner gloves used for the handling of asbestos-containing materials. Properly installed and used, glove bags provide a small work area enclosure typically used for small-scale asbestos stripping operations. Information on glove-bag installation, equipment and supplies, and work practices is contained in the Occupational Safety and Health Administration's (OSHA's) final rule on occupational exposure to asbestos (appendix G to 29 CFR 1926.58).

*Grinding* means to reduce to powder or small fragments and includes mechanical chipping or drilling.

*In poor condition* means the binding of the material is losing its integrity as indicated by peeling, cracking, or crumbling of the material.

*Inactive waste disposal site* means any disposal site or portion of it where additional asbestos-containing waste material has not been deposited within the past year.

*Installation* means any building or structure or any group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator (or owner or operator under common control).

*Leak-tight* means that solids or liquids cannot escape or spill out. It also means dust-tight.

*Malfunction* means any sudden and unavoidable failure of air pollution control equipment or process equipment or of a process to operate in a normal or usual manner so that emissions of asbestos are increased. Failures of equipment shall not be considered malfunctions if they are caused in any way by poor maintenance, careless operation, or any other preventable upset conditions, equipment breakdown, or process failure.

*Manufacturing* means the combining of commercial asbestos—or, in the case of woven friction products, the combining of textiles containing commercial asbestos—with any other material(s), including commercial asbestos, and the processing of this combination into a product. Chlorine production is considered a part of manufacturing.

*Natural barrier* means a natural object that effectively precludes or deters access. Natural barriers include physical obstacles such as cliffs, lakes or other large bodies of water, deep and wide ravines, and mountains. Remoteness by itself is not a natural barrier.

*Nonfriable asbestos-containing material* means any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy, that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

*Nonscheduled renovation operation* means a renovation operation necessitated by the routine failure of equipment, which is expected to occur within a given period based on past operating experience, but for which an exact date cannot be predicted.

*Outside air* means the air outside buildings and structures, including, but not limited to, the air under a bridge or in an open air ferry dock.

*Owner or operator of a demolition or renovation activity* means any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both.

*Particulate asbestos material* means finely divided particles of asbestos or material containing asbestos.

*Planned renovation operations* means a renovation operation, or a number of such operations, in which some RACM will be removed or stripped within a given period of time and that can be predicted. Individual nonscheduled operations are included if a number of such operations can be predicted to occur during a given period of time based on operating experience.

*Regulated asbestos-containing material* (RACM) means (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading,

or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

*Remove* means to take out RACM or facility components that contain or are covered with RACM from any facility.

*Renovation* means altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component. Operations in which load-supporting structural members are wrecked or taken out are demolitions.

*Resilient floor covering* means asbestos-containing floor tile, including asphalt and vinyl floor tile, and sheet vinyl floor covering containing more than 1 percent asbestos as determined using polarized light microscopy according to the method specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy.

*Roadways* means surfaces on which vehicles travel. This term includes public and private highways, roads, streets, parking areas, and driveways.

*Strip* means to take off RACM from any part of a facility or facility components.

*Structural member* means any load-supporting member of a facility, such as beams and load

supporting walls; or any nonload-supporting member, such as ceilings and nonload-supporting walls.

*Visible emissions* means any emissions, which are visually detectable without the aid of instruments, coming from RACM or asbestos-containing waste material, or from any asbestos milling, manufacturing, or fabricating operation. This does not include condensed, uncombined water vapor.

*Waste generator* means any owner or operator of a source covered by this subpart whose act or process produces asbestos-containing waste material.

*Waste shipment record* means the shipping document, required to be originated and signed by the waste generator, used to track and substantiate the disposition of asbestos-containing waste material.

*Working day* means Monday through Friday and includes holidays that fall on any of the days Monday through Friday.

**§ 61.145 Standard for demolition and renovation.**

(a) *Applicability.* To determine which requirements of paragraphs (a), (b), and (c) of this section apply to the owner or operator of a demolition or renovation activity and prior to the commencement of the demolition or renovation, thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the

presence of asbestos, including Category I and Category II nonfriable ACM. The requirements of paragraphs (b) and (c) of this section apply to each owner or operator of a demolition or renovation activity, including the removal of RACM as follows:

(1) In a facility being demolished, all the requirements of paragraphs (b) and (c) of this section apply, except as provided in paragraph (a)(3) of this section, if the combined amount of RACM is

(i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, or

(ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously.

(2) In a facility being demolished, only the notification requirements of paragraphs (b)(1), (2), (3)(i) and (iv), and (4)(i) through (vii) and (4)(ix) and (xvi) of this section apply, if the combined amount of RACM is

(i) Less than 80 linear meters (260 linear feet) on pipes and less than 15 square meters (160 square feet) on other facility components, and

(ii) Less than one cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously or there is no asbestos.

(3) If the facility is being demolished under an order of a State or local government agency, issued

because the facility is structurally unsound and in danger of imminent collapse, only the requirements of paragraphs (b)(1), (b)(2), (b)(3)(iii), (b)(4) (except (b)(4)(viii)), (b)(5), and (c)(4) through (c)(9) of this section apply.

(4) In a facility being renovated, including any individual nonscheduled renovation operation, all the requirements of paragraphs (b) and (c) of this section apply if the combined amount of RACM to be stripped, removed, dislodged, cut, drilled, or similarly disturbed is

(i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, or

(ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously.

(iii) To determine whether paragraph (a)(4) of this section applies to planned renovation operations involving individual nonscheduled operations, predict the combined additive amount of RACM to be removed or stripped during a calendar year of January 1 through December 31.

(iv) To determine whether paragraph (a)(4) of this section applies to emergency renovation operations, estimate the combined amount of RACM to be removed or stripped as a result of the sudden, unexpected event that necessitated the renovation.

(5) Owners or operators of demolition and renovation operations are exempt from the requirements of §§61.05(a), 61.07, and 61.09.

(b) *Notification requirements.* Each owner or operator of a demolition or renovation activity to which this section applies shall:

(1) Provide the Administrator with written notice of intention to demolish or renovate. Delivery of the notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.

(2) Update notice, as necessary, including when the amount of asbestos affected changes by at least 20 percent.

(3) Postmark or deliver the notice as follows:

(i) At least 10 working days before asbestos stripping or removal work or any other activity begins (such as site preparation that would break up, dislodge or similarly disturb asbestos material), if the operation is described in paragraphs (a) (1) and (4) (except (a)(4)(iii) and (a)(4)(iv)) of this section. If the operation is as described in paragraph (a)(2) of this section, notification is required 10 working days before demolition begins.

(ii) At least 10 working days before the end of the calendar year preceding the year for which notice is being given for renovations described in paragraph (a)(4)(iii) of this section.

(iii) As early as possible before, but not later than, the following working day if the operation is a demolition ordered according to paragraph (a)(3) of this section or, if the operation is a renovation described in paragraph (a)(4)(iv) of this section.

(iv) For asbestos stripping or removal work in a demolition or renovation operation, described in paragraphs (a) (1) and (4) (except (a)(4)(iii) and (a)(4)(iv)) of this section, and for a demolition described in paragraph (a)(2) of this section, that will begin on a date other than the one contained in the original notice, notice of the new start date must be provided to the Administrator as follows:

(A) When the asbestos stripping or removal operation or demolition operation covered by this paragraph will begin after the date contained in the notice,

( *1* ) Notify the Administrator of the new start date by telephone as soon as possible before the original start date, and

( *2* ) Provide the Administrator with a written notice of the new start date as soon as possible before, and no later than, the original start date. Delivery of the updated notice by the U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.

(B) When the asbestos stripping or removal operation or demolition operation covered by this paragraph will begin on a date earlier than the original start date,

( *1* ) Provide the Administrator with a written notice of the new start date at least 10 working days before asbestos stripping or removal work begins.

( *2* ) For demolitions covered by paragraph (a)(2) of this section, provide the Administrator written notice of a new start date at least 10 working days before commencement of demolition. Delivery of updated notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.

(C) In no event shall an operation covered by this paragraph begin on a date other than the date contained in the written notice of the new start date.

(4) Include the following in the notice:

(i) An indication of whether the notice is the original or a revised notification.

(ii) Name, address, and telephone number of both the facility owner and operator and the asbestos removal contractor owner or operator.

(iii) Type of operation: demolition or renovation.

(iv) Description of the facility or affected part of the facility including the size (square meters [square feet] and number of floors), age, and present and prior use of the facility.

(v) Procedure, including analytical methods, employed to detect the presence of RACM and Category I and Category II nonfriable ACM.

(vi) Estimate of the approximate amount of RACM to be removed from the facility in terms of length of pipe in linear meters (linear feet), surface area in square meters (square feet) on other facility components, or volume in cubic meters (cubic feet) if off the facility components. Also, estimate the approximate amount of Category I and Category II nonfriable ACM in the affected part of the facility that will not be removed before demolition.

(vii) Location and street address (including building number or name and floor or room number, if appropriate), city, county, and state, of the facility being demolished or renovated.

(viii) Scheduled starting and completion dates of asbestos removal work (or any other activity, such as site preparation that would break up, dislodge, or similarly disturb asbestos material) in a demolition or renovation; planned renovation operations involving individual nonscheduled operations shall only include the beginning and ending dates of the report period as described in paragraph (a)(4)(iii) of this section.

(ix) Scheduled starting and completion dates of demolition or renovation.

(x) Description of planned demolition or renovation work to be performed and method(s) to be employed, including demolition or renovation techniques to be used and description of affected facility components.

(xi) Description of work practices and engineering controls to be used to comply with the requirements of this subpart, including asbestos removal and waste-handling emission control procedures.

(xii) Name and location of the waste disposal site where the asbestos-containing waste material will be deposited.

(xiii) A certification that at least one person trained as required by paragraph (c)(8) of this section will supervise the stripping and removal described by this notification. This requirement shall become effective 1 year after promulgation of this regulation.

(xiv) For facilities described in paragraph (a)(3) of this section, the name, title, and authority of the State or local government representative who has ordered the demolition, the date that the order was issued, and the date on which the demolition was ordered to begin. A copy of the order shall be attached to the notification.

(xv) For emergency renovations described in paragraph (a)(4)(iv) of this section, the date and hour that the emergency occurred, a description of the sudden, unexpected event, and an explanation of how the event caused an unsafe condition, or would cause equipment damage or an unreasonable financial burden.

(xvi) Description of procedures to be followed in the event that unexpected RACM is found or Category II nonfriable ACM becomes crumbled, pulverized, or reduced to powder.

(xvii) Name, address, and telephone number of the waste transporter.

(5) The information required in paragraph (b)(4) of this section must be reported using a form similiar to that shown in Figure 3.

(c) *Procedures for asbestos emission control.* Each owner or operator of a demolition or renovation activity to whom this paragraph applies, according to paragraph (a) of this section, shall comply with the following procedures:

(1) Remove all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal. RACM need not be removed before demolition if:

(i) It is Category I nonfriable ACM that is not in poor condition and is not friable.

(ii) It is on a facility component that is encased in concrete or other similarly hard material and is adequately wet whenever exposed during demolition; or

(iii) It was not accessible for testing and was, therefore, not discovered until after demolition began and, as a result of the demolition, the material cannot be safely removed. If not removed for safety reasons, the exposed RACM and any asbestos-contaminated debris must be treated as asbestos-

containing waste material and adequately wet at all times until disposed of.

(iv) They are Category II nonfriable ACM and the probability is low that the materials will become crumbled, pulverized, or reduced to powder during demolition.

(2) When a facility component that contains, is covered with, or is coated with RACM is being taken out of the facility as a unit or in sections:

(i) Adequately wet all RACM exposed during cutting or disjoining operations; and

(ii) Carefully lower each unit or section to the floor and to ground level, not dropping, throwing, sliding, or otherwise damaging or disturbing the RACM.

(3) When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.

(i) In renovation operations, wetting is not required if:

(A) The owner or operator has obtained prior written approval from the Administrator based on a written application that wetting to comply with this paragraph would unavoidably damage equipment or present a safety hazard; and

(B) The owner or operator uses of the following emission control methods:

( *1* ) A local exhaust ventilation and collection system designed and operated to capture the particulate asbestos material produced by the stripping and removal of the asbestos materials. The system must exhibit no visible emissions to the outside air or be designed and operated in accordance with the requirements in §61.152.

( *2* ) A glove-bag system designed and operated to contain the particulate asbestos material produced by the stripping of the asbestos materials.

( *3* ) Leak-tight wrapping to contain all RACM prior to dismantlement.

(ii) In renovation operations where wetting would result in equipment damage or a safety hazard, and the methods allowed in paragraph (c)(3)(i) of this section cannot be used, another method may be used after obtaining written approval from the Administrator based upon a determination that it is equivalent to wetting in controlling emissions or to the methods allowed in paragraph (c)(3)(i) of this section.

(iii) A copy of the Administrator's written approval shall be kept at the worksite and made available for inspection.

(4) After a facility component covered with, coated with, or containing RACM has been taken out of the facility as a unit or in sections pursuant to paragraph (c)(2) of this section, it shall be stripped or contained in leak-tight wrapping, except as

described in paragraph (c)(5) of this section. If stripped, either:

(i) Adequately wet the RACM during stripping; or

(ii) Use a local exhaust ventilation and collection system designed and operated to capture the particulate asbestos material produced by the stripping. The system must exhibit no visible emissions to the outside air or be designed and operated in accordance with the requirements in §61.152.

(5) For large facility components such as reactor vessels, large tanks, and steam generators, but not beams (which must be handled in accordance with paragraphs (c)(2), (3), and (4) of this section), the RACM is not required to be stripped if the following requirements are met:

(i) The component is removed, transported, stored, disposed of, or reused without disturbing or damaging the RACM.

(ii) The component is encased in a leak-tight wrapping.

(iii) The leak-tight wrapping is labeled according to §61.149(d)(1)(i), (ii), and (iii) during all loading and unloading operations and during storage.

(6) For all RACM, including material that has been removed or stripped:

(i) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with §61.150; and

(ii) Carefully lower the material to the ground and floor, not dropping, throwing, sliding, or otherwise damaging or disturbing the material.

(iii) Transport the material to the ground via leak-tight chutes or containers if it has been removed or stripped more than 50 feet above ground level and was not removed as units or in sections.

(iv) RACM contained in leak-tight wrapping that has been removed in accordance with paragraphs (c)(4) and (c)(3)(i)(B)( *3* ) of this section need not be wetted.

(7) When the temperature at the point of wetting is below 0 °C (32 °F):

(i) The owner or operator need not comply with paragraph (c)(2)(i) and the wetting provisions of paragraph (c)(3) of this section.

(ii) The owner or operator shall remove facility components containing, coated with, or covered with RACM as units or in sections to the maximum extent possible.

(iii) During periods when wetting operations are suspended due to freezing temperatures, the owner or operator must record the temperature in the area containing the facility components at the beginning, middle, and end of each workday and keep daily

temperature records available for inspection by the Administrator during normal business hours at the demolition or renovation site. The owner or operator shall retain the temperature records for at least 2 years.

(8) Effective 1 year after promulgation of this regulation, no RACM shall be stripped, removed, or otherwise handled or disturbed at a facility regulated by this section unless at least one on-site representative, such as a foreman or management-level person or other authorized representative, trained in the provisions of this regulation and the means of complying with them, is present. Every 2 years, the trained on-site individual shall receive refresher training in the provisions of this regulation. The required training shall include as a minimum: applicability; notifications; material identification; control procedures for removals including, at least, wetting, local exhaust ventilation, negative pressure enclosures, glove-bag procedures, and High Efficiency Particulate Air (HEPA) filters; waste disposal work practices; reporting and recordkeeping; and asbestos hazards and worker protection. Evidence that the required training has been completed shall be posted and made available for inspection by the Administrator at the demolition or renovation site.

(9) For facilities described in paragraph (a)(3) of this section, adequately wet the portion of the facility that contains RACM during the wrecking operation.

(10) If a facility is demolished by intentional burning, all RACM including Category I and

Category II nonfriable ACM must be removed in accordance with the NESHAP before burning.

**§ 61.150 Standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations.**

Each owner or operator of any source covered under the provisions of §§61.144, 61.145, 61.146, and 61.147 shall comply with the following provisions:

(a) Discharge no visible emissions to the outside air during the collection, processing (including incineration), packaging, or transporting of any asbestos-containing waste material generated by the source, or use one of the emission control and waste treatment methods specified in paragraphs (a) (1) through (4) of this section.

(1) Adequately wet asbestos-containing waste material as follows:

(i) Mix control device asbestos waste to form a slurry; adequately wet other asbestos-containing waste material; and

(ii) Discharge no visible emissions to the outside air from collection, mixing, wetting, and handling operations, or use the methods specified by §61.152 to clean emissions containing particulate asbestos material before they escape to, or are vented to, the outside air; and

(iii) After wetting, seal all asbestos-containing waste material in leak-tight containers while wet; or, for materials that will not fit into containers without

additional breaking, put materials into leak-tight wrapping; and

(iv) Label the containers or wrapped materials specified in paragraph (a)(1)(iii) of this section using warning labels specified by Occupational Safety and Health Standards of the Department of Labor, Occupational Safety and Health Administration (OSHA) under 29 CFR 1910.1001(j)(4) or 1926.1101(k)(8). The labels shall be printed in letters of sufficient size and contrast so as to be readily visible and legible.

(v) For asbestos-containing waste material to be transported off the facility site, label containers or wrapped materials with the name of the waste generator and the location at which the waste was generated.

(2) Process asbestos-containing waste material into nonfriable forms as follows:

(i) Form all asbestos-containing waste material into nonfriable pellets or other shapes;

(ii) Discharge no visible emissions to the outside air from collection and processing operations, including incineration, or use the method specified by §61.152 to clean emissions containing particulate asbestos material before they escape to, or are vented to, the outside air.

(3) For facilities demolished where the RACM is not removed prior to demolition according to §§61.145(c)(1) (i), (ii), (iii), and (iv) or for facilities demolished according to §61.145(c)(9), adequately wet asbestos-containing waste material at all times

after demolition and keep wet during handling and loading for transport to a disposal site. Asbestos-containing waste materials covered by this paragraph do not have to be sealed in leak-tight containers or wrapping but may be transported and disposed of in bulk.

(4) Use an alternative emission control and waste treatment method that has received prior approval by the Administrator according to the procedure described in §61.149(c)(2).

# DOCUMENT 6

## Appendix E to Subpart E of Part 763 -- Interim Method of the Determination of Asbestos in Bulk Insulation Samples

## SECTION 1, POLARIZED LIGHT MICROSCOPY

## Appendix E to Subpart E of Part 763 – Interim Method of the Determination of Asbestos in Bulk Insulation Samples

### SECTION 1, POLARIZED LIGHT MICROSCOPY

### 1.1 Principle and Applicability

Bulk samples of building materials taken for asbestos identification are first examined for homogeneity and preliminary fiber identification at low magnification. Positive identification of suspect fibers is made by analysis of subsamples with the polarized light microscope.

The principles of optical mineralogy are well established. [1] [2] A light microscope equipped with two polarizing filters is used to observe specific optical characteristics of a sample. The use of plane polarized light allows the determination of refractive indices along specific crystallographic axes. Morphology and color are also observed. A retardation plate is placed in the polarized light path for determination of the sign of elongation using orthoscopic illumination. Orientation of the two filters such that their vibration planes are perpendicular (crossed polars) allows observation of the birefringence and extinction characteristics of anisotropic particles.

Quantitative analysis involves the use of point counting. Point counting is a standard technique in petrography for determining the relative areas occupied by separate minerals in thin sections of rock. Background information on the use of point

counting [2] and the interpretation of point count data[3] is available.

This method is applicable to all bulk samples of friable insulation materials submitted for identification and quantitation of asbestos components.

## 1.2 Range

The point counting method may be used for analysis of samples containing from 0 to 100 percent asbestos. The upper detection limit is 100 percent. The lower detection limit is less than 1 percent.

## 1.3 Interferences

Fibrous organic and inorganic constituents of bulk samples may interfere with the identification and quantitation of the asbestos mineral content. Spray-on binder materials may coat fibers and affect color or obscure optical characteristics to the extent of masking fiber identity. Fine particles of other materials may also adhere to fibers to an extent sufficient to cause confusion in identification. Procedures that may be used for the removal of interferences are presented in Section 1.7.2.2.

## 1.4 Precision and Accuracy

Adequate data for measuring the accuracy and precision of the method for samples with various matrices are not currently available. Data obtained for samples containing a single asbestos type in a simple matrix are available in the EPA report *Bulk*

*Sample Analysis for Asbestos Content: Evaluation of the Tentative Method. 4*

## 1.5 Apparatus

### 1.5.1 *Sample Analysis*

A low-power binocular microscope, preferably stereoscopic, is used to examine the bulk insulation sample as received.

- *Microscope:* binocular, 10-45X (approximate).
- *Light Source:* incandescent or fluorescent.
- *Forceps, Dissecting Needles, and Probes*
- *Glassine Paper or Clean Glass Plate*

Compound microscope requirements: A polarized light microscope complete with polarizer, analyzer, port for wave retardation plate, 360° graduated rotating stage, substage condenser, lamp, and lamp iris.

- *Polarized Light Microscope:* described above.
- *Objective Lenses:* 10X, 20X, and 40X or near equivalent.
- *Dispersion Staining Objective Lens* (optional)
- *Ocular Lens:* 10X minimum.
- *Eyepiece Reticle:* cross hair or 25 point Chalkley Point Array.
- *Compensator Plate:* 550 millimicron retardation.

### 1.5.2 *Sample Preparation*

Sample preparation apparatus requirements will depend upon the type of insulation sample under consideration. Various physical and/or chemical means may be employed for an adequate sample assessment.

- *Ventilated Hood* or negative pressure glove box.
- *Microscope Slides*
- *Coverslips*
- *Mortar and Pestle:* agate or porcelain. (optional)
- *Wylie Mill* (optional)
- *Beakers and Assorted Glassware* (optional)
- *Certrifuge* (optional)
- *Filtration apparatus* (optional)
- *Low temperature asher* (optional)

## 1.6 Reagents

### 1.6.1 *Sample Preparation*

- *Distilled Water (optional)*
- *Dilute CH3COOH:* ACS reagent grade (optional)
- *Dilute HCl:* ACS reagent grade (optional)
- *Sodium metaphosphate* (NaPO3)6 (optional)

### 1.6.2 *Analytical Reagents*

*Refractive Index Liquids:* 1.490-1.570, 1.590-1.720 in increments of 0.002 or 0.004.

- *Refractive Index Liquids for Dispersion Staining:* high-dispersion series, 1.550, 1.605, 1.630 (optional).

- *UICC Asbestos Reference Sample Set:* Available from: UICC MRC Pneumoconiosis Unit, Llandough Hospital, Penarth, Glamorgan CF6 1XW, UK, and commercial distributors.

- *Tremolite-asbestos* (source to be determined)
- *Actinolite-asbestos* (source to be determined)

## 1.7 Procedures

**Note:** Exposure to airborne asbestos fibers is a health hazard. Bulk samples submitted for analysis are usually friable and may release fibers during handling or matrix reduction steps. All sample and slide preparations should be carried out in a ventilated hood or glove box with continuous airflow (negative pressure). Handling of samples without these precautions may result in exposure of the analyst and contamination of samples by airborne fibers.

### 1.7.1 *Sampling*

Samples for analysis of asbestos content shall be taken in the manner prescribed in Reference 5 and information on design of sampling and analysis programs may be found in Reference 6. If there are any questions about the representative nature of the

sample, another sample should be requested before proceeding with the analysis.

### 1.7.2 *Analysis*

#### 1.7.2.1 *Gross Examination*

Bulk samples of building materials taken for the identification and quantitation of asbestos are first examined for homogeneity at low magnification with the aid of a stereomicroscope. The core sample may be examined in its container or carefully removed from the container onto a glassine transfer paper or clean glass plate. If possible, note is made of the top and bottom orientation. When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, and then the results for each layer are combined to yield an estimate of asbestos content for the whole sample.

#### 1.7.2.2 *Sample Preparation*

Bulk materials submitted for asbestos analysis involve a wide variety of matrix materials. Representative subsamples may not be readily obtainable by simple means in heterogeneous materials, and various steps may be required to alleviate the difficulties encountered. In most cases, however, the best preparation is made by using forceps to sample at several places from the bulk material. Forcep samples are immersed in a refractive index liquid on a microscope slide, teased apart, covered with a cover glass, and observed with the polarized light microscope.

Alternatively, attempts may be made to homogenize the sample or eliminate interferences before further characterization. The selection of appropriate procedures is dependent upon the samples encountered and personal preference. The following are presented as possible sample preparation steps.

A mortar and pestle can sometimes be used in the size reduction of soft or loosely bound materials though this may cause matting of some samples. Such samples may be reduced in a Wylie mill. Apparatus should be clean and extreme care exercised to avoid cross-contamination of samples. Periodic checks of the particle sizes should be made during the grinding operation so as to preserve any fiber bundles present in an identifiable form. These procedures are not recommended for samples that contain amphibole minerals or vermiculite. Grinding of amphiboles may result in the separation of fiber bundles or the production of cleavage fragments with aspect ratios greater than 3:1. Grinding of vermiculite may also produce fragments with aspect ratios greater than 3:1.

Acid treatment may occasionally be required to eliminate interferences. Calcium carbonate, gypsum, and bassanite (plaster) are frequently present in sprayed or trowelled insulations. These materials may be removed by treatment with warm dilute acetic acid. Warm dilute hydrochloric acid may also be used to remove the above materials. If acid treatment is required, wash the sample at least twice with distilled water, being careful not to lose the particulates during decanting steps. Centrifugation or filtration of the suspension will

prevent significant fiber loss. The pore size of the filter should be 0.45 micron or less. Caution: prolonged acid contact with the sample may alter the optical characteristics of chrysotile fibers and should be avoided.

Coatings and binding materials adhering to fiber surfaces may also be removed by treatment with sodium metaphosphate. [7] Add 10 mL of 10g/L sodium metaphosphate solution to a small (0.1 to 0.5 mL) sample of bulk material in a 15-mL glass centrifuge tube. For approximately 15 seconds each, stir the mixture on a vortex mixer, place in an ultrasonic bath and then shake by hand. Repeat the series. Collect the dispersed solids by centrifugation at 1000 rpm for 5 minutes. Wash the sample three times by suspending in 10 mL distilled water and recentrifuging. After washing, resuspend the pellet in 5 mL distilled water, place a drop of the suspension on a microscope slide, and dry the slide at 110 °C.

In samples with a large portion of cellulosic or other organic fibers, it may be useful to ash part of the sample and view the residue. Ashing should be performed in a low temperature asher. Ashing may also be performed in a muffle furnace at temperatures of 500 °C or lower. Temperatures of 550 °C or higher will cause dehydroxylation of the asbestos minerals, resulting in changes of the refractive index and other key parameters. If a muffle furnace is to be used, the furnace thermostat should be checked and calibrated to ensure that samples will not be heated at temperatures greater than 550 °C.

Ashing and acid treatment of samples should not be used as standard procedures. In order to monitor possible changes in fiber characteristics, the material should be viewed microscopically before and after any sample preparation procedure. Use of these procedures on samples to be used for quantitation requires a correction for percent weight loss.

### 1.7.2.3 *Fiber Identification*

Positive identification of asbestos requires the determination of the following optical properties.

- Morphology
- Color and pleochroism
- Refractive indices
- Birefringence
- Extinction characteristics
- Sign of elongation

Table 1-1 lists the above properties for commercial asbestos fibers. Figure 1-1 presents a flow diagram of the examination procedure. Natural variations in the conditions under which deposits of asbestiform minerals are formed will occasionally produce exceptions to the published values and differences from the UICC standards. The sign of elongation is determined by use of the compensator plate and crossed polars. Refractive indices may be determined by the Becke line test. Alternatively, dispersion staining may be used. Inexperienced operators may find that the dispersion staining technique is more

easily learned, and should consult Reference 9 for guidance. Central stop dispersion staining colors are presented in Table 1-2. Available high-dispersion (HD) liquids should be used.

Table 1-1_Optical Properties of Asbestoc Fibers

| Mineral | Morphology, color | Refrac- tive indices \b\ [alpha] | [gamma] | Birefringence | Extinction \a\ | Sign of elonation |
|---|---|---|---|---|---|---|
| Chrysotile (asbestiform (normally serpentine). | Wavy fibers. Fiber .008 [verbar] to fiber length. splayed ends and ``kinks". Aspect ratio typically >10:1. Colorless \3\, nonpleochroic. | 1.493-1.560 | 1.517-1.562\f\ | .008 | bundles have (length slow) | + |
| Amosite (asbestiform (normally grunerite). | Straight, rigid .020-.033 [verbar] to fibers. Aspect fiber length. ratio typically >10:1. Colorless to brown, nonpleochroic or | 1.635-1.696 | 1.655-1.729 | .020-.033 | (length slow) | + |
| | | \f\ | 1.696-1.710. | | | |

| | | | |
|---|---|---|---|
| | weakly so. Opaque inclusions may be present. | | |
| Crocidolite (asbestiform Riebeckite). | Straight, rigid fiber length. (normally common, blue to purple-blue in color. Pleochroic. Birefringence is generally masked by blue color. | 1.654-1.701 .014-.016 [verbar] to 1.717\3e\ fast) | 1.668- fibers. Thick (length fibers and bundles close to 1.700). |
| Anthophyllite-asbestos. | Straight fibers and acicular cleavage fragments.\d\ Some composite fibers. Aspect ratio <10:1. Colorless to light brown. | 1.596-1.652 .019-.024 [verbar] to 1.676 (length slow) | + \f\. fiber length. |
| Tremolite-actinolite-asbestos. | Normally present as acicular or prismatic cleavage fragments.\d\ Single crystals | 1.599-1.668 .023-.020 Oblique (length slow) | 1.622-1.688 + \f\. extinction, 10-20° for fragments. |

predominate, aspect Composite
ratio <10:1. fibers
Colorless to pale show[verbar]
green.
extinction.

---

---

\a\ From reference 5; colors cited are seen by observation with plane polarized light.
\b\ From references 5 and 8.
\c\ Fibers subjected to heating may be brownish.
\d\ Fibers defined as having aspect ratio >3:1.
\e\ to fiber length.
\f\ [verbar]To fiber length.

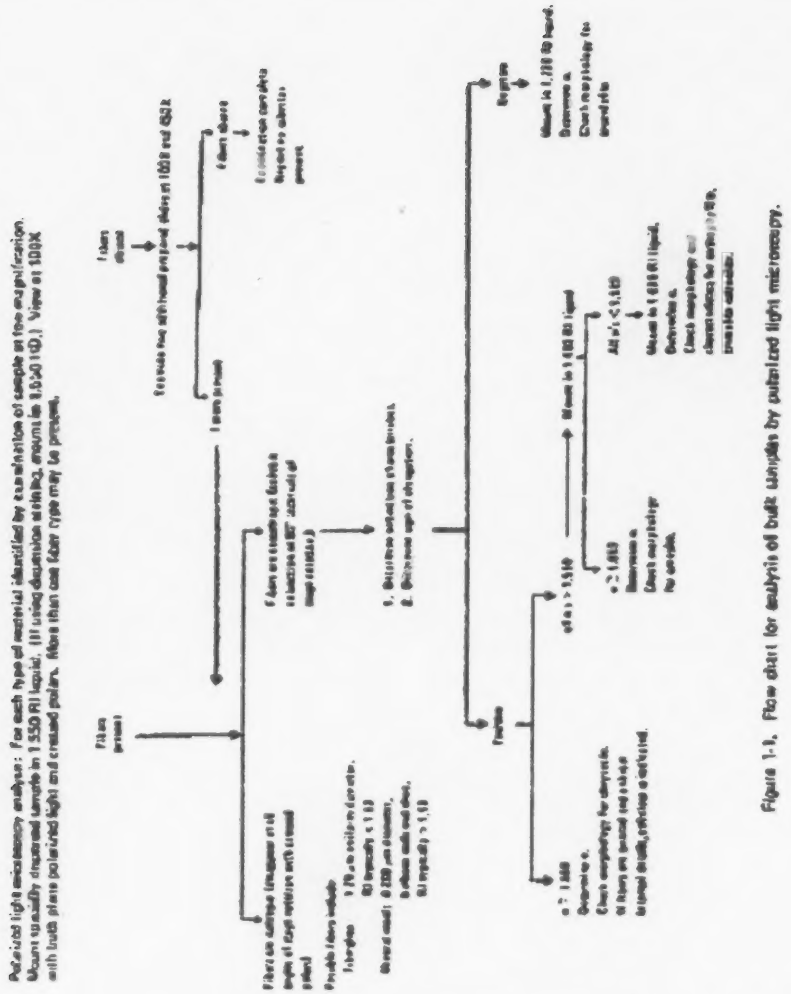

Figure 1-1. Flow chart for analysis of bulk samples by polarized light microscopy.

*View or Download PDF*

Table 1-2_Central Stop Dispersion Staining Colors \a\

---

---

Mineral RI Liquid [eta] [eta][verbar]



Best Available Copy

---

---

Chrysotile..... 1.550 \HD\ Blue..... Blue-magenta

Amosite..... 1.680 Blue-magenta to pale blue.. Golden-yellow

1.550\HD\ Yellow to white..... Yellow to white

Crocidolite \b\..... 1.700 Red magenta..... Blue-magenta

1.550\HD\ Yellow to white..... Yellow to white

Anthophyllite..... 1.605\HD\ Blue..... Gold to gold-magenta

Tremolite..... 1.605\HD c\ Pale blue..... Gold

Actinolite..... 1.605\HD\ Gold-magenta to blue..... Gold

1.630\HD c\ Magenta..... Golden-yellow

---

---

\a\ From reference 9.

\b\ Blue absorption color.

\c\ Oblique extinction view.

### 1.7.2.4 *Quantitation of Asbestos Content*

Asbestos quantitation is performed by a point-counting procedure or an equivalent estimation method. An ocular reticle (cross-hair or point array) is used to visually superimpose a point or points on the microscope field of view. Record the number of

points positioned directly above each kind of particle or fiber of interest. Score only points directly over asbestos fibers or nonasbestos matrix material. Do not score empty points for the closest particle. If an asbestos fiber and a matrix particle overlap so that a point is superimposed on their visual intersection, a point is scored for both categories. Point counting provides a determination of the area percent asbestos. Reliable conversion of area percent to percent of dry weight is not currently feasible unless the specific gravities and relative volumes of the materials are known.

For the purpose of this method, "asbestos fibers" are defined as having an aspect ratio greater than 3:1 and being positively identified as one of the minerals in Table 1-1.

A total of 400 points superimposed on either asbestos fibers or nonasbestos matrix material must be counted over at least eight different preparations of representative subsamples. Take eight forcep samples and mount each separately with the appropriate refractive index liquid. The preparation should not be heavily loaded. The sample should be uniformly dispersed to avoid overlapping particles and allow 25-50 percent empty area within the fields of view. Count 50 nonempty points on each preparation, using either

- A cross-hair reticle and mechanical stage; or

- A reticle with 25 points (Chalkley Point Array) and counting at least 2 randomly selected fields.

For samples with mixtures of isotropic and anisotropic materials present, viewing the sample with slightly uncrossed polars or the addition of the compensator plate to the polarized light path will allow simultaneous discrimination of both particle types. Quantitation should be performed at 100X or at the lowest magnification of the polarized light microscope that can effectively distinguish the sample components. Confirmation of the quantitation result by a second analyst on some percentage of analyzed samples should be used as standard quality control procedure.

The percent asbestos is calculated as follows:

% asbestos=(a/n) 100%

where

a=number of asbestos counts,

n=number of nonempty points counted (400).

If a=0, report "No asbestos detected." If 0< a≦3, report "<1% asbestos".

The value reported should be rounded to the nearest percent.

## 1.8 References

1. Paul F. Kerr, *Optical Mineralogy,* 4th ed., New York, McGraw-Hill, 1977.

2. E. M. Chamot and C. W. Mason, *Handbook of Chemical Microscopy, Volume One,* 3rd ed., New York: John Wiley & Sons, 1958.

3. F. Chayes, *Petrographic Modal Analysis: An Elementary Statistical Appraisal,* New York: John Wiley & Sons, 1956.

4. E. P. Brantly, Jr., K. W. Gold, L. E. Myers, and D. E. Lentzen, *Bulk Sample Analysis for Asbestos Content: Evaluation of the Tentative Method,* U.S. Environmental Protection Agency, October 1981.

5. U.S. Environmental Protection Agency, *Asbestos-Containing Materials in School Buildings: A Guidance Document,* Parts 1 and 2, EPA/OPPT No. C00090, March 1979.

6. D. Lucas, T. Hartwell, and A. V. Rao, *Asbestos-Containing Materials in School Buildings: Guidance for Asbestos Analytical Programs,* EPA 560/13-80-017A, U.S. Environmental Protection Agency, December 1980, 96 pp.

7. D. H. Taylor and J. S. Bloom, Hexametaphosphate pretreatment of insulation samples for identification of fibrous constituents, *Microscope, 28,* 1980.

8. W. J. Campbell, R. L. Blake, L. L. Brown, E. E. Cather, and J. J. Sjoberg. *Selected Silicate Minerals and Their Asbestiform Varieties: Mineralogical Definitions and Identification-Characterization,* U.S. Bureau of Mines Information Circular 8751, 1977.

9. Walter C. McCrone, *Asbestos Particle Atlas,* Ann Arbor: Ann Arbor Science Publishers, June 1980.

# DOCUMENT 7

## 42 U.S.C. §7412(d)(1)

42 U.S.C. §7412(d)(1)

**(d) Emission standards**

**(1) In general**

The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

# DOCUMENT 8

## 5 U.S.C. §553 Rule Making

5 U.S.C. § 553. Rule making

**(a)** This section applies, according to the provisions thereof, except to the extent that there is involved—

**(1)** a military or foreign affairs function of the United States; or

**(2)** a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

**(b)** General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

**(1)** a statement of the time, place, and nature of public rule making proceedings;

**(2)** reference to the legal authority under which the rule is proposed; and

**(3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

**(A)** to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

**(B)** when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

**(c)** After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

**(d)** The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

**(1)** a substantive rule which grants or recognizes an exemption or relieves a restriction;

**(2)** interpretative rules and statements of policy; or

**(3)** as otherwise provided by the agency for good cause found and published with the rule.

**(e)** Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

# DOCUMENT 9

NR 484.04(28) Code of federal regulations appendices.

**NR 484.04 Code of federal regulations appendices.**

The appendices to federal regulations in effect on March 1, 2006 listed in the first column of Table 2 are incorporated by reference for the corresponding sections of chs. NR 400 to 439 and 445 to 499 or code of federal regulations appendix method listed in the third column of Table 2. Since some of these materials are incorporated by reference for another appendix of the code of federal regulations and the other appendix is also incorporated by reference in this section, the materials listed in this section which are incorporated by reference for the other appendix are hereby also incorporated by reference and made a part of this chapter.

**Table 2**

**CFR Appendix References**

| CFR Appendix Referenced | Title | Incorporated by Reference For |
|---|---|---|
| (28) 40 CFR part 763 Subpart E, Appendix E, Section 1 | Polarized Light Microscopy | NR 447.02 (1) (a) and (b)<br>NR 447.02 (16)<br>NR 447.02 (27)<br>NR 447.02 (36)<br>NR 447.09 (1) (a) and (b) (intro.) |

# DOCUMENT 10

NR 447.01
NR 447.02
NR447.06
NR 447.08
NR 447.13

**NR 447.01 Applicability; purpose.**

**NR 447.01(1)**

**(1) Applicability.** This chapter applies to all air contaminant sources which may emit asbestos, to their owners and operators and to any person whose action causes the emission of asbestos to the ambient air.

**NR 447.01(2)**

**(2) Purpose.** This chapter is adopted under ss. 285.11, 285.13, 285.17 and 285.27, Stats., to establish emission limitations for asbestos air contaminant sources, to establish procedures to be followed when working with asbestos materials and to create additional reporting and recordkeeping requirements for owners or operators of asbestos air contaminant sources in order to protect air quality.

**NR 447.02 Definitions.**

The definitions contained in ch. NR 400 apply to the terms used in this chapter. In addition, the following definitions apply to the terms used in this chapter:

(1) "ACM" means asbestos–containing material.

(a) "Category I nonfriable ACM" means asbestos–containing packings, gaskets, resilient floor covering and asphalt roofing products containing more than 1% asbestos as determined using the method specified in Appendix E to Subpart E, 40

CFR part 763, section 1, Polarized Light Microscopy, incorporated by reference in s. NR 484.04 (28), that, when dry, cannot be crumbled, pulverized or reduced to powder by hand pressure.

(b) "Category II nonfriable ACM" means any material, excluding Category I nonfriable ACM, containing more than 1% asbestos as determined using the method specified in Appendix E to Subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized or reduced to powder by hand pressure.

**(2)** "Active waste disposal site" means any disposal site other than an inactive disposal site.

**(3)** "Adequately wet" means sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos–containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

**(4)** "Asbestos" means the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite–grunerite (amosite), anthophyllite and actinolite–tremolite.

**(5)** "Asbestos–containing waste materials" means mill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of this chapter. This term includes filters from control devices, friable asbestos waste material, and bags or other similar packaging contaminated

with commercial asbestos. As applied to demolition and renovation operations, this term also includes regulated asbestos–containing material waste and materials contaminated with asbestos including disposable equipment and clothing.

**(6)** "Asbestos mill" means any facility engaged in converting, or in any intermediate step in converting, asbestos ore into commercial asbestos. Outside storage of asbestos material is not considered a part of the asbestos mill.

**(7)** "Asbestos tailings" means any solid waste that contains asbestos and is a product of asbestos mining or milling operations.

**(8)** "Asbestos waste from control devices" means any waste material that contains asbestos and is collected by a pollution control device.

**(9)** "Commercial asbestos" means any material containing asbestos that is extracted from ore and has value because of its asbestos content.

**(10)** "Cutting" means to penetrate with a sharp–edged instrument and includes sawing, but does not include shearing, slicing or punching.

**(11)** "Demolition" means the wrecking or taking out of any load–supporting structural member of a facility together with any related handling operations or the intentional burning of any facility.

**(12)** "Emergency renovation operation" means a renovation operation that was not planned but

results from a sudden, unexpected event that, if not immediately attended to, presents a safety or public health hazard, is necessary to protect equipment from damage, or is necessary to avoid imposing an unreasonable financial burden. This term includes operations necessitated by non– routine failures of equipment.

**(13)** "Fabricating" means any processing, cutting, sawing or drilling, of a manufactured product that contains commercial asbestos, with the exception of processing at temporary sites (field fabricating) for the construction or restoration of facilities. In the case of friction products, fabricating includes bonding, debonding, grinding, sawing, drilling or other similar operations performed as part of fabricating.

**(14)** "Facility" means any institutional, commercial, public, industrial or residential structure, installation or building, including any structure, installation or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having 4 or fewer dwelling units; any ship; and any active or inactive waste disposal site. For purposes of this definition, any building, structure or installation that contains a loft used as a dwelling is not considered a residential structure, installation or building. Any structure, installation or building that was previously subject to this chapter is not excluded, regardless of its current use or function.

**(15)** "Facility component" means any part of a facility including equipment.

**(16)** "Friable asbestos material" means any material containing more than 1% asbestos as determined using the method specified in Appendix E to Subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy, incorporated by reference in s. NR 484.04 (28), that, when dry, can be crumbled, pulverized or reduced to powder by hand pressure. If the asbestos content of the friable ACM is less than 10%, as determined by a method other than point counting by polarized light microscopy (PLM), the asbestos content shall be verified by point counting using PLM.

**(17)** "Fugitive source" means any source of emissions not controlled by an air pollution control device.

**(18)** "Glove bag" means a sealed compartment with attached inner gloves used for the handling of asbestos–containing materials.
**Note:** Properly installed and used, glove bags provide a small work area enclosure typically used for small–scale asbestos stripping operations. Information on glove– bag installation, equipment and supplies, and work practices is contained in OSHA's final rule on occupational exposure to asbestos in 29 CFR 1926.1101(g)(5)(ii) as in effect on July 1, 2002, incorporated by reference in s. NR 484.03 (4).

**(19)** "Grinding" means to reduce to powder or small fragments and includes mechanical chipping or drilling.

**(20)** "In poor condition" means the binding of the material is losing its integrity as indicated by peeling, cracking or crumbling of the material.

**(21)** "Inactive waste disposal site" means any disposal site or portion of it where additional asbestos–containing waste material has not been deposited within the past year.

**(22)** "Installation" means any building or structure or any group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator, or owner or operator under common control.

**(23)** "Leak–tight" means designed or constructed so that solids or liquids, including dust, cannot escape or spill out.

**(24)** "Malfunction" means any sudden and unavoidable failure of air pollution control equipment or process equipment or of a process to operate in a normal or usual manner so that emissions of asbestos are increased. "Malfunction" does not include failures of equipment if they are caused in any way by poor maintenance, careless operation or any other preventable upset conditions, equipment breakdown or process failure.

**(25)** "Manufacturing" means the combining of commercial asbestos, or, in the case of woven friction products, the combining of textiles containing commercial asbestos, with any other material, including commercial asbestos, and the processing of

this combination into a product. Chlorine production is considered a part of manufacturing.

**(26)** "Natural barrier" means a natural object that effectively precludes or deters access. Natural barriers include physical obstacles such as cliffs, lakes or other large bodies of water, deep and wide ravines, and mountains. Remoteness by itself is not a natural barrier.

**(27)** "Nonfriable ACM" means any material containing more than 1% asbestos as determined using the method specified in Appendix E to Subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy, incorporated by reference in s. NR 484.04 (28), that, when dry, cannot be crumbled, pulverized or reduced to powder by hand pressure.

**(28)** "Nonscheduled renovation operation" means a renovation operation necessitated by the routine failure of equipment, which is expected to occur within a given period based on past operating experience, but for which an exact date cannot be predicted.

**(29)** "Outside air" means the air outside buildings and structures, including, but not limited to, the air under a bridge or in an open air ferry dock.

**(30)** "Owner or operator of a demolition or renovation activity" means any person who owns, leases, operates, controls or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls or supervises the demolition or renovation operation, or both.

**(31)** "Particulate asbestos material" means finely divided particles of asbestos or asbestos–containing material.

**(32)** "Planned renovation operations" means a renovation operation, or a number of such operations, in which some RACM will be removed or stripped within a given period of time and that can be predicted. "Planned renovation operations" includes individual nonscheduled renovation operations if a number of such operations can be predicted to occur during a given period of time based on operating experience.

**(33)** "Regulated asbestos–containing material" or "RACM" means:

(a) Friable asbestos material;

(b) Category I nonfriable ACM that has become friable;

(c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting or abrading; or

(d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this chapter.

**(34)** "Remove" means to take out RACM or facility components that contain or are covered with RACM from any facility.

**(35)** "Renovation" means altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component.
**Note:** Operations in which load–supporting structural members are wrecked or taken out are demolitions.

**(36)** "Resilient floor covering" means asbestos–containing floor tile, including asphalt and vinyl floor tile and sheet vinyl floor covering containing more than 1% asbestos as determined using polarized light microscopy according to the method specified in Appendix E to Subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy, incorporated by reference in s. NR 484.04 (28).

**(37)** "Roadways" means surfaces on which vehicles travel. This term includes public and private highways, roads, streets, parking areas and driveways.

**(38)** "Strip" means to take off RACM from any part of a facility or facility component.

**(39)** "Structural member" means any load supporting member of a facility, such as beams and load supporting walls; or any non–load supporting member, such as ceilings and non–load supporting walls.

**(40)** "Visible emissions" means any emissions, which are visually detectable without the aid of instruments, coming from RACM or asbestos–containing waste material, or from any asbestos milling, manufacturing or fabricating operation. This does not include condensed, uncombined water vapor.

**(41)** "Waste generator" means any owner or operator of a source covered by this chapter whose act or process produces asbestos–containing waste material.

**(42)** "Waste shipment record" means the shipping document, required under s. NR 447.12 (5) (a), 447.13 (4) (a) or 447.17 (5) (a) to be originated and signed by the waste generator, used to track and substantiate the disposition of asbestos–containing waste material.

**(43)** "Working day" means Monday through Friday and includes holidays that fall on any of the days Monday through Friday.

**History:** Cr. Register, October, 1992, No. 442, eff. 11–1–92; am. (intro.), (1) (a), (16), (27), (36), r. (4), Register, December, 1995, No. 480, eff. 1–1–96; am. (3), Register, November, 1999, No. 527, eff. 12–1–99; CR 02–097: renum. NR 445.02 (2) to be NR 447.02 (4), am. (intro.) Register June 2004 No. 582, eff. 7–1–04.

**NR 447.06 Demolition and renovation; applicability.**

**(1)** PRE–INSPECTION. To determine which requirements of this section and ss. NR 447.07 and 447.08 apply to the owner or operator of a demolition or renovation activity, the owner or operator shall, prior to the commencement of the demolition or renovation, thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos, including Category I and Category II nonfriable ACM.

**(2)** APPLICABILITY. The requirements of ss. NR 447.07 and 447.08 apply to each owner or operator of a demolition or renovation activity, including the removal of RACM as follows:

(a) In a facility being demolished, all the requirements of ss. NR 447.07 and 447.08 apply, except as provided in par. (c), if the combined amount of RACM meets any of the following:

1. At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components; or

2. At least one cubic meter (35 cubic feet) off of facility components where the length or area could not be measured previously.

(b) In a facility being demolished, only the notification requirements of ss. NR 447.07 (1), (2), (3) (a) and (d), and (4) (a) to (g), (i) and (p) apply if the combined amount of RACM meets all of the following:

1. Less than 80 linear meters (260 linear feet) on pipes and less than 15 square meters (160 square feet) on other facility components; and

2. Less than one cubic meter (35 cubic feet) off of facility components where the length or area could not be measured previously or there is no asbestos.

(c) If the facility is being demolished under an order of a state or local government agency, issued because the facility is structurally unsound and in danger of imminent collapse, only the requirements of ss. NR 447.07 (1), (2), (3) (c), (4) (a) to (g) and (i) to (q) and 447.08 (4) to (9) apply.

(d) 1. In a facility being renovated, including any individual nonscheduled renovation operation, all the requirements of ss. NR 447.07 and 447.08 apply if the combined amount of RACM to be stripped, removed, dislodged, cut, drilled or similarly disturbed meets any of the following:

a. At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components; or

b. At least one cubic meter (35 cubic feet) off of facility components where the length or area could not be measured previously.

2. To determine whether this paragraph applies to planned renovation operations involving individual nonscheduled renovation operations, the owner or operator shall predict the combined additive amount of RACM to be removed or stripped during a calendar year.

3. To determine whether this paragraph applies to emergency renovation operations, the owner or operator shall estimate the combined amount of RACM to be removed or stripped as a result of the sudden, unexpected event that necessitated the renovation.

**History:** Cr. Register, October, 1992, No. 442, eff. 11–1–92; correction in (2) (c) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 1993, No. 449.

**NR 447.07 Demolition and renovation; notification requirements.**

Each owner or operator of a demolition or renovation activity to which this chapter applies shall:

**(1)** Provide the department with written notice of intention to demolish or renovate. Delivery of the notice by U.S. postal service, commercial delivery service or hand delivery is acceptable.

**(2)** Update the notice, as necessary, including when the amount of asbestos affected changes by at least 20%.

(3) Postmark or deliver the notice as follows:

(a) At least 10 working days before asbestos stripping or removal work or any other activity begins, such as site preparation that would break up, dislodge or similarly disturb asbestos material, if the operation is described in s. NR 447.06 (2) (a) or (d) 1. If the operation is as described in s. NR 447.06 (2) (b), notification is required 10 working days before demolition begins.

(b) At least 10 working days before the end of the calendar year preceding the year for which notice is being given for planned renovations referred to in s. NR 447.06 (2) (d) 2.

(c) As early as possible before, but not later than, the following working day if the operation is a demolition ordered according to s. NR 447.06 (2) (c) or if the operation is an emergency renovation referred to in s. NR 447.06 (2) (d) 3.

(d) For asbestos stripping or removal work in a demolition or renovation operation, described in s. NR 447.06 (2) (a) or (d) 1., and for demolition described in s. NR 447.06 (2) (b) that will begin on a date other than the one contained in the original notice, the owner or operator shall provide notice of the new start date to the department as follows:

1. When the asbestos stripping or removal operation or demolition operation covered by this paragraph will begin after the date contained in the notice:

a. Notify the department of the new start date by telephone as soon as possible before the original start date, and

b. Provide the department with a written notice of the new start date as soon as possible before, but no later than, the original start date. Delivery of the updated notice by the U.S. postal service, commercial delivery service or hand delivery is acceptable.

2. When the asbestos stripping or removal operation or demolition operation covered by this paragraph will begin on a date earlier than the original start date:

a. Provide the department with a written notice of the new start date at least 10 working days before asbestos stripping or removal work begins.

b. For demolitions covered by s. NR 447.06 (2) (b), provide the department written notice of a new start date at least 10 working days before commencement of demolition. Delivery of updated notice by U.S. postal service, commercial delivery service or hand delivery is acceptable.

3. In no event may an operation covered by this paragraph begin on a date other than the date contained in the written notice of the new start date.

**(4)** Include the following in the notice:

(a) An indication of whether the notice is the original or a revised notification.

(b) Name, address and telephone number of both the facility owner and operator and the asbestos removal contractor owner or
operator.

(c) Type of operation: demolition or renovation.

(d) Description of the facility or affected part of the facility including the size (square meters [square feet] and number of floors), age and present and prior use of the facility.

(e) Procedure, including analytical methods, employed to detect the presence of RACM and Category I and Category II nonfriable ACM.

(f) Estimate of the approximate amount of RACM to be removed from the facility in terms of length of pipe in linear meters (linear feet), surface area in square meters (square feet) on other facility components, or volume in cubic meters (cubic feet) if off the facility components. Also, estimate the approximate amount of Category I and Category II nonfriable ACM in the affected part of the facility that will not be removed before demolition.

(g) Location and street address, including building number or name and floor or room number, if appropriate, city, county and state of the facility being demolished or renovated.

(h) Scheduled starting and completion dates of asbestos removal work, or any other activity, such as site preparation that would break up, dislodge or

similarly disturb asbestos material, in a demolition or renovation; planned renovation operations involving individual nonscheduled operations shall only include the beginning and ending dates of the report period as described in s. NR 447.06 (2) (d) 2.
(i) Scheduled starting and completion dates of demolition or renovation.

(j) Description of planned demolition or renovation work to be performed and methods to be employed, including demolition or
renovation techniques to be used and description of affected facility components.

(k) Description of work practices and engineering controls to be used to comply with the requirements of this chapter, including asbestos removal and waste–handling emission control procedures.

(L) Name and location of the waste disposal site where the asbestos–containing waste material will be deposited.

(m) A certification that at least one person trained as required by s. NR 447.08 (8) will supervise the stripping and removal described by this notification. This requirement shall become effective one year after November 1, 1992.

(n) For facilities described in s. NR 447.06 (2) (c), the name, title and authority of the state or local government representative who has ordered the demolition, the date that the order was issued, and the date on which the demolition was ordered to

begin. A copy of the order shall be attached to the notification.

(o) For emergency renovations referred to in s. NR 447.06 (2)(d) 3., the date and hour that the emergency occurred, a description of the sudden, unexpected event, and an explanation of how the event caused an unsafe condition, or would cause equipment damage or an unreasonable financial burden.

(p) Description of procedures to be followed in the event that unexpected RACM is found or Category II nonfriable ACM becomes crumbled, pulverized or reduced to powder.

(q) Name, address and telephone number of the waste transporter.

**History:** Cr. Register, October, 1992, No. 442, eff. 11–1–92; correction in (3) and (4) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 1993, No. 449; am. (3) (a), (d) (intro.), Register, December, 1995, No. 480, eff. 1–1–96.

**NR 447.08 Demolition and renovation; procedures for asbestos emission control.**

Each owner or operator of a demolition or renovation activity to whom this section applies, according to s. NR 447.06, shall comply with the following procedures:

(1) Remove all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge or similarly disturb the material or preclude access to the material for subsequent removal. RACM need not be removed before demolition if any of the following apply:

(a) It is Category I nonfriable ACM that is not in poor condition and is not friable.

(am) Removal of category I roofing shall meet the specifications in the Interpretive Rule Governing Roof Removal Operations, 40 CFR part 61, Appendix A to Subpart M, incorporated by reference in s. NR 484.04 (21s), see corresponding comment on ch. NR 484.

(b) It is on a facility component that is encased in concrete or other similarly hard material and is adequately wet whenever exposed during demolition.

(c) It was not accessible for testing and was, therefore, not discovered until after demolition began and, as a result of the demolition, the material cannot be safely removed. If not removed for safety reasons, the exposed RACM and any asbestos–contaminated debris shall be treated as asbestos–containing waste material and adequately wet at all times until disposed of.

(d) It is Category II nonfriable ACM and the probability is low that the materials will become crumbled, pulverized or reduced to powder during demolition.

**(2)** When a facility component that contains, is covered with or is coated with RACM is being taken out of the facility as a unit or in sections:

(a) Adequately wet all RACM exposed during cutting or disjoining operations; and

(b) Carefully lower each unit or section to the floor and to ground level, not dropping, throwing, sliding or otherwise damaging or disturbing the RACM.

**(3)** When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.

(a) In renovation operations, wetting is not required if:

1. The owner or operator has obtained prior written approval from the department based on a written application that wetting to comply with this subsection would unavoidably damage equipment or present a safety hazard; and

2. The owner or operator uses one of the following emission control methods:

a. A local exhaust ventilation and collection system designed and operated to capture the particulate asbestos material produced by the stripping and removal of the asbestos materials. The system shall exhibit no visible emissions to the outside air or be designed and operated in accordance with the requirements in s. NR 447.15.

b. A glove–bag system designed and operated to contain the particulate asbestos material produced by the stripping of the asbestos materials.

c. Leak–tight wrapping to contain all RACM prior to dismantlement.

(b) In renovation operations where wetting would result in equipment damage or a safety hazard, and the methods allowed in par. (a) cannot be used, another method may be used after obtaining written approval from the department based upon a determination that it is equivalent to wetting in controlling emissions or to the methods allowed in par. (a).

(c) A copy of the department's written approval shall be kept at the work site and made available for inspection.

**(4)** After a facility component covered with, coated with or containing RACM has been taken out of the facility as a unit or in sections pursuant to sub. (2), it shall be stripped or contained in leak–tight wrapping, except as described in sub. (5). If stripped, either:

(a) Adequately wet the RACM during stripping; or

(b) Use a local exhaust ventilation and collection system designed and operated to capture the particulate asbestos material produced by the stripping. The system shall exhibit no visible emissions to the outside air or be designed and

operated in accordance with the requirements in s. NR 447.15.

**(5)** For large facility components such as reactor vessels, large tanks and steam generators, but not beams, which shall be handled in accordance with subs. (2) to (4), the RACM is not required to be stripped if the following requirements are met:

(a) The component is removed, transported, stored, disposed of or reused without disturbing or damaging the RACM.

(b) The component is encased in a leak–tight wrapping.

(c) The leak–tight wrapping is labeled according to s. NR 447.12 during all loading and unloading operations and during storage.

**(6)** For all RACM, including material that has been removed or stripped:

(a) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with s. NR 447.13; and

(b) Carefully lower the material to the ground and floor, not dropping, throwing, sliding or otherwise damaging or disturbing the material.

(c) Transport the material to the ground via leak–tight chutes or containers if it has been removed or

stripped more than 50 feet above ground level and was not removed as units or in sections.

(d) RACM contained in leak–tight wrapping that has been removed in accordance with subs. (3) (a) 2. c. and (4) need not be wetted.

**(7)** When the temperature at the point of wetting is below 0□C (32□F):

(a) The owner or operator need not comply with sub. (2) (a) and the wetting provisions of sub. (3).

(b) The owner or operator shall remove facility components containing, coated with, or covered with RACM as unit or in sections to the maximum extent possible.

(c) During periods when wetting operations are suspended due to freezing temperatures, the owner or operator shall record the temperature in the area containing the facility components at the beginning, middle and end of each working day and keep daily temperature records available for inspection by the department during normal business hours at the demolition or renovation site. The owner or operator shall retain the temperature records for at least 2 years.

**(8)** No RACM may be stripped, removed or otherwise handled or disturbed at a facility regulated by this chapter unless at least one on–site representative, such as a foreman or management –level person or other authorized representative, trained in the provisions of this chapter and the means of

complying with them, is present. Every 2 years, the trained on–site individual shall receive refresher training in the provisions of this chapter. The required training shall include at a minimum: applicability; notifications; material identification; control procedures for removals including, at least, wetting, local exhaust ventilation, negative pressure enclosures, glove–bag procedures, and High Efficiency Particulate Air (HEPA) filters; waste disposal work practices; reporting and record keeping; and asbestos hazards and worker protection. Each owner or operator shall post evidence that the required training has been completed and make such evidence available for inspection by the department at the demolition or renovation site.

**(9)** For facilities described in s. NR 447.06 (2) (c), adequately wet the portion of the facility that contains RACM during the wrecking operation.

**(10)** If a facility is demolished by intentional burning, all RACM including Category I and Category II nonfriable ACM shall be removed in accordance with this chapter before burning.

**History:** Cr. Register, October, 1992, No. 442, eff. 11–1–92; correction in (9) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 1993, No. 449; am. (2) (a), (3) (a) 1., (4) (intro.), (a) and (6) (a), Register, November, 1999, No. 527, eff. 12–1–99; CR 02–146: cr. (1) (am) Register October 2003 No. 574, eff. 11–1–03.

**NR 447.13 Waste disposal for manufacturing, fabricating, demolition, renovation and spraying operations.**

Each owner or operator of any source covered under the provisions of ss. NR 447.05 to 447.10 shall comply with the following provisions:

**(1)** Discharge no visible emissions to the outside air during the collection, processing (including incineration), packaging or transporting of any asbestos–containing waste material generated by the source, or use one of the emission control and waste treatment methods specified in pars. (a) to (d).

(a) Adequately wet asbestos–containing waste material as follows:

1. Mix control device asbestos waste to form a slurry; adequately wet other asbestos–containing waste material.

2. Discharge no visible emissions to the outside air from collection, mixing, wetting and handling operations, or use the methods specified by s. NR 447.15 to clean emissions containing particulate asbestos material before they escape to, or are vented to, the outside air.

3. After wetting, seal all asbestos–containing waste material in leak–tight containers while wet; or, for materials that will not fit into containers without additional breaking, put materials into leak–tight wrapping.

4. Label the containers or wrapped materials specified in subd.3. using warning labels specified by occupational safety and health standards of the U.S. department of labor, occupational safety and health administration, under 29 CFR 1910.1001 (j) (4) (ii) or 1926.1101 (k) (8) (iii), incorporated by reference in s. NR 484.03 (3) and (4). The labels shall be printed in letters of sufficient size and contrast so as to be readily visible and legible.

5. For asbestos–containing waste material to be transported off the facility site, label containers or wrapped materials with the name of the waste generator and the location at which the waste was generated.

(b) Process asbestos–containing waste material into nonfriable forms as follows:

1. Form all asbestos–containing waste material into nonfriable pellets or other shapes.

2. Discharge no visible emissions to the outside air from collection and processing operations, including incineration, or use the methods specified by s. NR 447.15 to clean emissions containing particulate asbestos material before they escape to, or are vented to, the outside air.

(c) For facilities demolished where the RACM is not removed prior to demolition according to s. NR 447.08 (1) (a) to (d) or for facilities demolished according to s. NR 447.08 (9), adequately wet asbestos–containing waste material at all times after demolition

and keep wet during handling and loading for transport to a disposal site. Asbestos–containing waste materials covered by this subsection do not have to be sealed in leak–tight containers or wrapping but may be transported and disposed of in bulk.

(d) Use an alternative emission control and waste treatment method that has received prior approval by the administrator as described under s. NR 447.12 (3) (b).

# DOCUMENT 11

5-42 Federal Register / Vol. 59, No. 3 / Wednesday, January 5, 1994 / Rules and Regulations

Environmental Protection Agency

40 CFR Part 61

5-42 Federal Register / Vol. 59, No. 3 / Wednesday, January 5, 1994 / Rules and Regulations

Environmental Protection Agency

40 CFR Part 61

[FRL-4821-7]

# Asbestos NESHAP Clarification Regarding Analysis of Multi-layered Systems

AGENCY: Environmental Protection Agency
ACTION: Notice of clarification to the final rule.

SUMMARY: This document provides clarification regarding the requirements of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos. It is intended to address common questions regarding situations where one or more layers which may contain asbestos are present.

FOR FURTHER INFORMATION CONTACT: Mr. Chris Oh at (703) 308-8732 or Mr. Jeffery KenKnight at (703) 308-8728.

SUPPLEMENTARY INFORMATION: On November 20, 1990, the Federal Register published the Environmental Protection Agency's (the Agency's) revision of the National Emission Standards for Hazardous Air Pollutants for Asbestos (asbestos NESHAP), 40 CFR part 61, subpart M, 55 FR 48-406. The asbestos NESHAP applies to any facility as defined in 40 CFR 61.141. The Agency has learned that some of the regulated community have

questions concerning the analysis of samples which may contain multiple layers, any or all of which may be asbestos containing materials (ACM) under the asbestos NESHAP. Because these questions are frequently asked, EPA is making this clarification.

This clarification does not supersede, alter, or in any way replace the existing asbestos NESHAP. This notice is intended solely as guidance and does not represent an action subject to judicial review under the section 307(b) of the Clean Air Act or section 704 of the Administrative Procedure Act.

I. Clarification of Multi-layered ACM System

The Environmental Protection Agency has received many questions about analyzing multi-layered systems for asbestos content to determine the applicability of the asbestos NESHAP. This clarification reiterates EPA's position for analysis of multi-layered samples for applicability of the asbestos NESHAP.

In general, when a sample consists of two or more distinct layers or materials, each layer should be treated separately and the results reported by layer (discrete stratum). Specific examples are given below.

*Plaster / Stucco Systems*

If plaster and stucco wall or ceiling systems are layered, and the layers can be distinguished, then the layers must be analyzed separately. Where a plaster or stucco wall system is constructed in

layers, and the asbestos-containing layer becomes a distinguishable but "non-separable" component of the wall system, the results of the analysis of the individual layer(s) may include a small amount of the other layers when analyzed (e.g. a skim coat layer may contain a small amount of the base coat layer in the analysis of the skim coat layer).

*Add-on Materials*

All materials "added" to wallboard or other base materials (e.g. sprayed-on materials, pain, ceiling or wall texture, etc.) must be analyzed separately, if possible. The results of the analysis of those individual layers of "add-on" material may not be averaged with the result of the analysis of wallboard for a composite result, but must be analyzed and reported separately. Where a thin coating of one material is applied over another material and the materials cannot be separated without compromising the layers, the analysis may include a small amount of the base layer. If for example, a paint layer containing asbestos is spread over a wallboard layer, and the paint layer cannot be separated from the wallboard, then a small amount of the wallboard layer may be included in the sample of the paint.

If any of the "add-on" materials meet the definition of regulated asbestos-containing material (as defined in 40 CFR 61.141), and if at least 160 square foot of the material(s) are involved in demolition or renovation (whether planned or unplanned during a calendar year), then the project would be subject to the asbestos NESHAP.

*Joint Compound / Wallboard*

When joint compound and/or tape is applied to wallboard it becomes an integral part of the wallboard and in effect becomes one material forming a wall system. Therefore, where a demolition or renovation impacts such a wall system, a composite analysis of the wall system (percent of asbestos in the joint compound, tape and wallboard) should be conducted. If the analysis shows an asbestos content of greater than one percent and at least 160 square feet of the wall system is involved in the demolition or renovation activities (whether planned or unplanned, during a calendar year), then the activities would be subject to the asbestos NESHAP.

Dated: December 3, 1993.
John Rasnic,
Director, Stationary Source Compliance Division, Office of Air Quality Planning and Standards.
[FR Doc. 94-74 Filed 1-4-94; 8:45 a.m.]
BILLING CODE 6560-50-P

# DOCUMENT 12

Asbestos NESHAP Clarification Regarding Analysis of Multi-Layered Systems

Federal Register: December 19, 1995 (Volume 60, Number 243); Rules and Regulations; Page 65243-65244. From the Federal Register Online via GPO Access [wais.access.gpo.gov]

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 61

[FRL-5399-3]

Asbestos NESHAP Clarification Regarding Analysis of Multi-Layered Systems

Asbestos NESHAP Clarification Regarding Analysis of Multi-Layered Systems

Federal Register: December 19, 1995 (Volume 60, Number 243); Rules and Regulations; Page 65243-65244. From the Federal Register Online via GPO Access [wais.access.gpo.gov]

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 61

[FRL-5399-3]

Asbestos NESHAP Clarification Regarding Analysis of Multi-Layered Systems

ACTION: Notice of clarification to the final rule.

SUMMARY: This document provides clarification regarding the requirements of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos. It is intended to address common questions regarding situations where one or more layers which may contain asbestos are present, and supplement the January 5, 1994 Federal Register clarification (59 FR 542).

EFFECTIVE DATE: December 19, 1995

FOR FURTHER INFORMATION CONTACT: For copies, contact Mr. Larry Tessier at 1-800-368-5888 or at (703) 305-5938. For questions about the clarification, please contact Mr. Tom Ripp at (202) 564-7003.

SUPPLEMENTARY INFORMATION: On November 20, 1990, the Federal Register published the Environmental Protection Agency's (the Agency's) revision of the National Emission Standards for Hazardous Air Pollutants for Asbestos (asbestos NESHAP), 40 CFR part 61, subpart M, 55 FR 48406. The asbestos NESHAP applies to any facility as defined in 40 CFR 61.141. The Agency has learned that some of the regulated community have further questions concerning the analysis of samples which may contain multiple layers, any or all of which may be asbestos-containing materials (ACM) under the asbestos NESHAP. Because these questions are frequently asked, EPA is making this clarification.

I. Clarification of Multi-Layered ACM System

At the time the original asbestos NESHAP was promulgated (April 6, 1973), a standardized reference method had not been developed to determine quantitatively the content of asbestos in a material. The definition for "friable asbestos material" was added in the October 14, 1975 asbestos NESHAP, but still did not specify an analytical method. EPA's unwritten policy based on the definition of "friable asbestos material" was that each layer in a multi-layered system was to be analyzed as a separate material (no averaging or dilution by combining layers of asbestos-containing material with nonasbestos-containing material was allowed). The November 20, 1990 revision of the asbestos NESHAP finally specified that Appendix A, Subpart F, 40 CFR Part 763, Section 1, Polarized Light Microscopy (PLM method) be used to

determine whether or not a material contains greater than one percent asbestos. Section 1.7.2.1 of the PLM method states that "***When discrete strata are identified, each is treated as a separate material so that fibers are first quantified in that layer only, and then the results for each layer are combined to yield an estimate of asbestos content for the whole sample." This language has led to considerable confusion as to how to analyze multi-layered samples for NESHAP purposes. EPA published a clarification regarding the analysis of multi-layered systems in the January 5, 1994 Federal Register. This clarification basically stated that all multi-layered systems except for wall systems where joint compound was used only at the joints and nail holes must be analyzed as separate materials, and results were not allowed to be combined to determine average asbestos content (continuing the policy that dilution of an asbestos-containing material is not allowed).

The Environmental Protection Agency has received many questions about analyzing multi-layered systems for asbestos content to determine the applicability of the asbestos NESHAP since its January 5, 1994 clarification (59 FR 542). This clarification reiterates EPA's position for analysis of multi-layered samples for applicability of the asbestos NESHAP.

This clarification applies to all multi-layered systems (other than wallboard systems where asbestos-containing joint compound is used only at the joints and nail holes) under both the NESHAP

and the Asbestos Hazard Emergency Response Act (AHERA) (40 CFR Part 763) programs.

Any source sending multi-layered bulk samples to a lab may request that certain sample(s) or portions of sample(s) be composited for analysis first (to potentially reduce time and cost of sampling).

(Note: A composite sample does not mean that multiple samples may be composited into one sample. It means that multiple layers of one core sample may be composited for analysis.)

If this alternative method is chosen, then the following requirements must be followed. To analyze the composite sample, the procedures in EPA/600-93/116 "Method for the Determination of Asbestos in Bulk Building Materials" ("the Method"), specifically Section 2.3 "Gravimetry," must be used. Additionally, for the composite sample, the recommendations in Appendix D of the method must be followed. This procedure is consistent with the procedures outlined in 40 CFR Part 763, Appendix E to Subpart E (formerly Appendix A to Subpart F), which is referenced in the asbestos NESHAP (40 CFR 61.141 and 61.146), but the procedures in the new method are more clear. EPA finds that this method is an acceptable alternative method of compliance under section 61.13(h)(1)(ii). EPA intends to amend the asbestos NESHAP in the near future to refer specifically to these procedures. When using the gravimetric procedures, the result may be recorded as percent asbestos by weight.

If the result of the composite analysis shows that the average content for the multi-layered system (across the layers) is greater than one percent, then the multi-layered system must be treated as asbestos-containing and analysis by layers is not necessary. If the result of the composite sample analysis indicates that the multi-layered system as a whole contains asbestos in the amount of one percent or less, but greater than none detected, then analysis by layers is required to ensure that no layer in the system contains greater than on percent asbestos. If any layer contains greater than one percent asbestos, that layer must be treated as asbestos-containing. This will have the effect of requiring all layers in a multi-layered system to be treated as asbestos-containing if the layers can not be separated without disturbing the asbestos-containing layer. Once any one layer is shown to have greater than one percent asbestos, further analysis of the other layers is not necessary if all the layers will be treated as asbestos-containing. If several of the layers will be removed without removing the entire system, then all layers that will be disturbed must be analyzed. This includes the material being removed; however, the material being removed may be analyzed using the composite analysis procedures. Please note that the same requirements to perform point counting stated in our May 8, 1991 clarification (see enclosed memorandum) still apply for any layers being analyzed individually.

[Page 65244]

Dated: September 28, 1995.

Richard Biondi, Acting Director, Manufacturing, Energy, and Transportation Division, Office of Compliance.

[FR Doc. 95-30790 Filed 12-18-95; 8:45 a.m.]
BILLING CODE 6560-50-P

# DOCUMENT 13

2006 WL 3913457 (S.D.Cal.)
United States District Court,
S.D. California.
UNITED STATES of America, Plaintiff,
v.
SAN DIEGO GAS & ELECTRIC COMPANY, et al.,
Defendants.
No. 06 CR 0065 DMS.

Nov. 21, 2006.

ORDER GRANTING MOTION TO DISMISS COUNTS 1, 2, 3 AND 5 OF THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE INVOLVING JURISDICTIONAL AMOUNT OF "REGULATED" ASBESTOS-CONTAINING MATERIAL

2006 WL 3913457 (S.D.Cal.)
United States District Court,
S.D. California.
UNITED STATES of America, Plaintiff,
v.
SAN DIEGO GAS & ELECTRIC COMPANY, et al.,
Defendants.
No. 06 CR 0065 DMS.

Nov. 21, 2006.

# ORDER GRANTING MOTION TO DISMISS COUNTS 1, 2, 3 AND 5 OF THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE INVOLVING JURISDICTIONAL AMOUNT OF "REGULATED" ASBESTOS-CONTAINING MATERIAL

DANA M. SABRAW, United States District Judge.

*1 Defendants move to dismiss four counts of the Indictment for failure to state an offense. At issue are the Government's allegations regarding "work practice" violations, stemming from Defendants' removal of asbestos containing materials. Because the work practice standards apply only to "regulated" asbestos containing material, and the Indictment does not charge the essential elements of such an offense, it must be dismissed.

## I.

## BACKGROUND

On January 11, 2006, a federal grand jury returned the Indictment in this case. The Indictment stems

from San Diego Gas & Electric Company's ("SDG & E") removal of asbestos pipe coating material from an underground pipeline allegedly in violation of work practice standards promulgated by the Environmental Protection Agency ("EPA"). SDG & E owned a sixteen acre parcel of land at 1350 San Altos Place in Lemon Grove, an area known as the Encanto Property. The Encanto Gas Holder Facility was located on the Property. The facility is a former natural gas storage and delivery facility comprised primarily of a compressor station and 9.23 miles of underground gas pipeline. In June 1999, SDG & E entered into a tentative agreement to sell the Property to a developer. The sale required SDG & E to demolish the Encanto Facility and remove the underground pipeline. The pipe, comprising the pipeline, was wrapped in coal tar insulation ("pipe wrap") that contained six discrete layers of material, one or more of which contained asbestos. The removal of the pipeline began in September 2000, and was completed by early 2001.

Defendant Kyle Rheubottom served as project superintendent of the general contractor hired by SDG & E to demolish the Encanto Facility. Defendants Jacquelyn Mc Hugh and David Joseph Williamson are SDG & E employees who oversaw the demolition project.

Both the County, through the San Diego County Air Pollution Control District ("APCD") and the San Diego County Department of Environmental Health ("DEH"), and the United States investigated the Encanto demolition. On August 30, 2005, the County filed a civil lawsuit on behalf of the APCD and DEH

alleging that Defendants violated the asbestos work practice standards during the removal of the pipeline. The County dismissed the lawsuit seven months later, after the United States returned the Indictment in this case.

### A. *Regulated Asbestos Containing Material ("RACM")*

The regulatory scheme promulgated by the EPA subjects the removal of certain "asbestos containing materials," known as "ACM," to environmental oversight and regulation. Not all materials containing asbestos, and not all demolition projects, are regulated. To be "regulated," the material and project must exceed certain thresholds regarding project size and asbestos content. Three conditions must exist: First, the amount of ACM to be removed must exceed (i) 260 linear feet on pipes, (ii) 160 square feet on other facility components, or (iii) 35 cubic feet where length or area cannot be measured (40 C.F.R. § 61.145(a)); *Second*, the quantity of asbestos fibers in the material must exceed 1% as determined by a "specified" test method (40 C.F.R. § 61.141); and *Third*, the ACM must be "friable," that is, it may be crumbled by hand pressure creating dust, or if initially "nonfriable," the ACM must be (i) "Category I" ACM that has become friable, (ii) Category I ACM that will be or has been subjected to certain acts of disturbance during the removal process (e.g., sanding, grading, cutting, or abrading), or (iii) "Category II" ACM that has a "high probability" of becoming friable due to acts of disturbance during the removal process. (*Id.*) The EPA desires to regulate asbestos that is friable or

may become friable because asbestos fibers may be released when asbestos is in a friable state, possibly causing incurable and fatal lung diseases to those who inhale such fibers.

*2 Accordingly, if the asbestos content is greater than 1 % as determined by the specified test, and the ACM is friable or of a qualifying nonfriable nature, then the material is deemed to be "Regulated Asbestos Containing Material," or "RACM." Further, if the project quantity threshold is met (*e.g.*, over 260 linear feet of pipe) and the material is RACM, then the demolition project is subject to the asbestos work practice standards.

**B. *The Indictment***

The Government contends Defendants knew the asbestos work practice standards applied to the demolition of the Encanto Facility, but nonetheless engaged in a coverup and knowingly failed to observe applicable work practice standards. The Indictment charges Defendants with five counts, four of which allege violations of work practice standards during the removal of alleged RACM. [FN1]

> FN1. Count Four of the Indictment alleges false statement under Title 18 U.S.C. § 1001, against Defendants SDG & E and David Williamson. Defendants' motion to dismiss the false statement count is addressed in a separate order.

The work practice counts allege Defendants

conspired to violate the work practice standards, failed to provide written notice to the EPA before removing the RACM, failed to adequately wet the RACM during removal, and failed to place the RACM in leak-tight wrapping. Specifically, Count 1 alleges Defendants knowingly conspired to "violate the asbestos work practices; in violation of Title 42, United States Code, Sections 7412 and 7413(c)(1)." (Indictment at 3 .) It further alleges Defendants "agreed [among themselves] that when communicating with government inspectors ... they would describe the coating removed from the underground piping as not federally regulated asbestos containing material [RACM]." (*Id.*) Count 2 alleges Defendants "failed to provide advance written notice to the U.S. Environmental Protection Agency ... of the removal of over 260 linear feet of regulated asbestos containing material [RACM], as required by 40 C.F.R. Section 61.145(b)." (Indictment at 6.) Count 3 alleges Defendants "failed to adequately wet the regulated asbestos containing material (RACM) during removal, as required by 40 C.F.R. Section61.145(b)." (Indictment at 6.) Count 5 alleges Defendants "failed to contain the regulated asbestos containing material (RACM) in a leak-tight wrapping, as required by 40 C.F.R. Section 61.145(c)." (Indictment at 7.)

The Indictment alleges only one of the three conditions relating to project size and asbestos content, specifically, that Defendants were "owner[s] or operators of an asbestos demolition operation involving over 260 linear feet" of pipe. It does not allege the elements of RACM. Rather, it simply charges that the material is "regulated asbestos

containing material (RACM)."

### C. *The Bill of Particulars*

Defendants moved for a bill of particulars on August 11, 2006. The Court granted the motion and ordered a bill of particulars regarding the category of ACM involved and whether the asbestos was regulated on the pipe or as a result of the method of removal. On September 8, 2006, the Government filed its bill of particulars, stating its "now ... official position" is that the pipe wrap is Category II ACM, although it concedes that at various earlier times county inspectors had taken the position that the material was Category I. (Bill of Particulars at 5.) Some inspectors initially thought the pipe wrap was Category I ACM, but later concluded "it could be Category II or a combination" of both. (*Id.*) Regardless, the bill of particulars makes clear that the pipe wrap contained multiple layers of material and was tested for asbestos under the following method:

***3** If a material believed to contain asbestos consists of several distinct and dissimilar layers, each layer must be separately analyzed for its asbestos content. *If any of the layers, standing alone, meets the definition of regulated asbestos containing material (i.e., over 1 % asbestos and friable), then the entire material is deemed to be regulated asbestos containing material, and the NESHAP work practice standards are applicable to the project.* Similarly, if nonfriable asbestos containing material is mixed with friable asbestos containing material, the resulting mixture must be treated as friable asbestos

containing material.

(Bill of Particulars at 9) (emphasis added) (citations omitted). Accordingly, under the Government's test method and present theory of prosecution, if *any* layer of the pipe wrap contained more than 1% asbestos and the asbestos was friable or had a high probability of becoming friable due to acts of disturbance during the removal process, the pipe wrap would be deemed RACM and its removal would be subject to the work practice standards.

**D. *Grounds for Dismissal***

Defendants seek dismissal on two grounds: (1) "[t]he Indictment fails to state an offense, as a matter of law, because it does not satisfy the jurisdictional predicate of demonstrating that the Encanto pipe coating material contains" more than 1% asbestos; and (2) the Government cannot "belatedly cure this jurisdictional defect" because it did not use the test method required by law and "no intact multi-layered material remains," thus depriving Defendants of due process and "the ability to vindicate themselves using the only scientific test method authorized by law to demonstrate that their conduct is lawful." (Motion to Dismiss at 2-3.) The Government disputes the Indictment is defective, asserting it adequately "tracks the language of the statute...." (Response at 45.) The Government further contends that while it did not use the test method cited by Defendants, there is no due process violation, as sufficient samples exist from which Defendants (and the Government) can--under any applicable test method--determine if the pipe wrap contains over 1%

asbestos. [FN2]

> FN2. Because the Court finds, as developed below, that the Indictment is fatally flawed for failing to allege all essential elements of the offenses charged, the Court declines to address Defendants' due process arguments.

## II.

## LEGAL STANDARD

Federal Rule of Criminal Procedure 12(b) provides: "Any defense, objection, or request which is capable of determination without a trial of the general issue may be raised before trial by motion." Fed.R.Crim.P. 12(b). "In ruling on a pre-trial motion to dismiss an indictment for failure to state an offense, the district court is bound by the four corners of the indictment." *United States v. Boren*, 278 F.3d 911, 914 (9th Cir.2002) (citations omitted). The court "should not consider evidence not appearing on the face of the indictment." *Id.*

An indictment must contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." Fed.R.Crim.P. 7(c)(1). An indictment also "must set forth the elements of the offense charged and contain a statement of the facts and circumstances that will inform the accused of the elements of the specific offense." *United States v. Fitzgerald*, 882 F.2d 397, 399 (9th Cir.1989) (citing *United States v. Martin*, 783 F.2d 1449, 1452 (9th Cir.1986). Under Rule 12(b)(2), a court is authorized to dismiss "an

indictment if its allegations do not suffice to charge an offense," but not if it merely fails to contain sufficient evidence "to prove the indictment's charges." *United States v. DeLaurentis*, 230 F.3d 659, 660-61 (3rd Cir.2001) (reversing dismissal where indictment "substantially track[ed] the language of the statute") (citing *United States v. Sampson*, 371 U.S. 75, 78-79 (1962)). "[I]f properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment." *United States v.Omer*, 395 F.3d 1087, 1088 (9th Cir.2005).

## III.

## DISCUSSION

*4 To sufficiently charge a violation of the work practice standards, the Government must allege, among other things, facts regarding project size and RACM. Applied to this case, the Government must allege: (1) the pipeline is of a certain size *(i.e .*, at least 260 linear feet) (40 C.F.R. § 61.145(1)); (2) the pipe wrap contains ACM that is more than 1% asbestos as determined by a specified test method (40 C.F.R. § 61.141); and (3) the ACM is friable or Category I or II nonfriable ACM. *(Id).* Defendants' motion focuses on the issue whether the Government's failure to allege that the pipe wrap contains more than 1% asbestos as determined by a specified test is a defect that warrants dismissal. Defendants also argue in a related motion that the Government's "internally inconsistent positions"

regarding the nature of ACM involved warrants dismissal. [FN3] Because Defendants challenge the sufficiency of the Indictment in the present motion, both elements of RACM are addressed in this Order.

> FN3. *See* Motion to Dismiss Counts 1, 2, 3 and 5 of the Indictment on Due Process Grounds (Internally Inconsistent Government Positions Re Nature of ACM) (Doc. No. 159). Defendants filed that motion and eight other substantive motions, including the present motion, on the same date. All of the motions were heard on October 27, 2006. In this Order, the Court addresses only the issue whether the Indictment fails to allege essential elements, as this issue is dispositive. The remaining motions, except as noted in footnote 1, *supra*, are denied as moot.

### A. *First Element of RACM: More than 1% Asbestos as Determined by Specified Test Method*

In concluding that the pipe wrap meets the 1% threshold amount, Defendants argue the Government relied on an improper test method to test bulk or multi-layered materials, one that was never properly enacted by the EPA. As set out in the bill of particulars, under the test method employed by the Government, each of the six layers of the pipe wrap was analyzed, and if *any* layer included more than 1% asbestos, the entire system was deemed to be regulated. (Bill of Particulars at 9.) This Order refers to the Government's test method as the "single-layer" test method.

According to Defendants, the correct test method--the one the EPA sought to replace with the single-layer method--requires the Government first to calculate the asbestos content of each layer, and then to *average* the results to determine the quantity of asbestos for the whole system. The whole system is regulated only if the average exceeds 1 percent. This Order refers to this test method as the "averaging" test method.

Defendants argue the Government's reliance on the wrong test method requires dismissal of the work practice counts. Defendants maintain the test method used by the Government--the single-layer method--is improper because the EPA failed to follow the rulemaking procedures set out in the Administrative Procedures Act ("APA") when promulgating that test method. According to Defendants, until and unless the EPA complies with rulemaking procedures, the single-layer method is not binding and cannot be used to support a criminal prosecution. In other words, a criminal prosecution for violation of work practice standards must be based on the averaging test method where, as here, multiple layers of ACM are involved. The Government disagrees, asserting the EPA need not have complied with rulemaking procedures because the single-layer test method is merely a "clarification" of the averaging test method.

***5** A review of the history of the regulation at issue and the rulemaking requirements of the APA is helpful to determining whether the single-layer test method is subject to the APA's rulemaking

requirements. If it is, it is not binding and does not replace the original (averaging) test "specified" in the regulation, and the Government must prosecute (and prove to the grand jury) its theory of the case under the averaging test method.

*1. History of Asbestos NESHAP Regulation*

The Clean Air Act authorizes the EPA to identify and regulate hazardous pollutants. 42 U.S.C. § 7412. Pursuant to § 7412, the EPA enacted the National Emission Standards for Hazardous Air Pollutants ("NESHAP"), setting out permissible emission standards for identified pollutants, one of which is asbestos. The asbestos NESHAP regulation was first promulgated in 1973. *See* 38 Fed.Reg. 8826, 8829-30 (Apr. 6, 1973). Among other things, the asbestos NESHAP requires owners and operators of asbestos containing facilities to follow certain procedures (*i.e.*, work practices) when removing regulated asbestos materials. 40 C.F.R. Part 61, Subpart M, section 61.145. Violation of NESHAP work practices constitutes a violation of the Clean Air Act. 42 U.S.C. § 7412(c) & (e). Since 1973, the asbestos NESHAP has been amended several times, in 1975, 1984, 1990 and 1994.

Although the 1973 NESHAP regulation sets out the basic framework, it remained quite undeveloped until 1990 when the EPA adhered to APA rulemaking requirements and made substantial changes to the NESHAP regulation. Among other things, the 1990 NESHAP amendments classified nonfriable asbestos as either Category I or Category II asbestos-containing materials. 55 Fed.Reg. 48406,

48409 (Nov. 20, 1990). In addition, the amendments replaced the weight-based standard to determine asbestos quantity in materials (1 % by weight) with a two-dimensional area-based standard (1 % by area). 55 Fed.Reg. 48406, 48410 (Nov. 20, 1990). To determine whether a material includes more than 1% asbestos by area, the EPA in its 1990 NESHAP amendments adopted a test method known as Polarized Light Microscopy ("PLM"), which was set forth in and borrowed from the Toxic Substances Control Act ("TSCA") of 1982 and the Asbestos Hazard Emergency Response Act ("AHERA") of 1987. 47 Fed.Reg. 23360, 23376 (May 27, 1982); 52 Fed.Reg. 41836, 41837 (Oct. 30, 1987).

Specifically, the 1990 NESHAP provides that asbestos containing material is regulated if it contains "more than 1 percent asbestos *as determined using the methods specified in* appendix E, subpart E, 40 C.F.R. part 763, section 1, Polarized Light Microscopy." 40 C.F.R. § 61.141 (emphasis added). With respect to bulk materials, the "specified" test method in the 1990 NESHAP provides for an averaging of the combined layers to determine asbestos content:

> Bulk samples of building materials taken for the identification and quantitation of asbestos are first examined for homogenity at low magnification with the aid of a stereomicroscope. The core sample may be examined in its container or carefully removed from the container onto a glassine transfer paper or clean glass plate. If possible, note is made of the top and bottom orientation. *When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in*

*that layer only, and then the results for each layer are combined to yield an estimate content for the whole sample.*

*6 40 C.F.R. part 763, section 1 (emphasis added).

In response to the 1990 NESHAP amendments, the EPA received numerous questions regarding bulk material analysis. In 1994, the EPA issued a "clarification" to its (averaging) test method. 59 Fed.Reg. 542 (Jan. 5, 1994). The EPA stated: "when a sample consists of two or more distinct layers or materials, *each layer should be treated separately and the results reported by layer* (discrete stratum)." *Id.* (emphasis added). The EPA's 1994 clarification, however, did not eliminate questions. In 1995, the EPA issued another clarification, explaining: "all multi-layered systems ... must be analyzed as separate materials, and *the results were not allowed to be combined to determine average asbestos content* ..." 60 Fed.Reg. 65243 (Dec. 19, 1995) (emphasis added). Defendants argue these "clarifications," resulting in the single layer test method, constitute impermissible rulemaking.

*2. The Administrative Procedures Act*

"The APA empowers federal courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be ... without observance of procedure required by law....' " *New York State Electric & Gas Corp. v. Saranac Power Partners, L.P.*, 267 F.3d 128, 131 (2nd Cir.2001) (citations omitted). "The APA creates a statutory scheme for informal or notice-and-comment rulemaking

reflecting 'judgment by Congress that the public interest is served by a careful and open review of proposed administrative rules and regulations.' " *Alcatraz v. Block*, 746 F.2d 593, 610 (9th Cir.1984) (citation omitted). "In most instances, agency 'rules' must be subjected to a notice and comment period before taking effect." *State Electric & Gas Corp.*, 267 F.3d at 131 (citing 5 U.S.C. § 553(c); *Alcatraz*, 764 F.2d at 610-611. "However, the APA excepts rules that are merely interpretive from this general procedure." *State Electric & Gas Corp.*, 267 F.3d at 131;5 U.S.C. § 553(d)(A). "[A]n agency may not escape the notice and comment requirements by labeling a major substantive legal addition to a rule a mere interpretation." *Applachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1024 (D.C.Cir.2000) (citation omitted).

Generally, a "substantive rule 'has the force of law,' while an interpretive rule is 'merely a clarification or explanation of an existing statute or rule' and is 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.' " *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir.1992). A rule is substantive if it "creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself...." *Dia Navigation Company, Ltd. v. Pomeroy*, 34 F.3d 1255, 1264 (3rd Cir.1994) (citations omitted). On the other hand, a rule is merely interpretive "if it attempts to clarify an existing rule but does not change existing law, policy, or practice." *Rocky Mountain Helicopters, Inc. v. Federal Aviation Claims*, 971 F.2d 544, 546-7 (10th Cir.1992). A substantive or legislative rule is

subject to the rulemaking requirements of the APA.

*3. The Promulgation of the "Single-Layer" Method is Legislative in Nature and Subject to the APA's Rulemaking Requirements*

*7 The single-layer method, as set out in the 1994 and 1995 clarifications, imposes new obligations on the regulated community by expanding the scope of regulated asbestos containing material. Under the averaging test method, to determine whether a multi-layered material contains more than 1% asbestos, a lab technician must (1) quantify the amount of asbestos fibers in each layer; and then (2) combine the results of each layer to determine "an estimate of asbestos content for the whole sample." The material is not regulated unless the combined result yields more than 1 percent asbestos.

The single-layer test method eliminates the second prong of the test. It provides that the material is regulated if any layer contains more than 1 percent asbestos. This test clearly expands the scope of regulated asbestos containing material because, undoubtedly, some materials previously considered not regulated under the averaging test method would be swept into the regulation under the single-layer test method. The clarifications, therefore, impose new obligations and duties on the regulated community where none existed prior to the amendment.

The EPA itself acknowledged that the two test methods have significant differences. In the 1995 amendments, the EPA explained that its "unwritten

policy" regarding analysis of bulk materials has been that "each layer in a multi-layered system would be analyzed as a separate material (no averaging or dilution by combining layers of asbestos-containing material with nonasbestos-containing material was allowed.)" 60 Fed.Reg. 65243. The clarifications, therefore, attempt to carry out this unwritten policy without rulemaking procedures.

Moreover, in a Notice of Advisory issued on August 1, 1994, the EPA announced an "improved test method" for bulk sample analysis for both the AHERA and NESHAP regulations. 59 Fed.Reg. 38970 (Aug. 1, 1994). In addition to introducing new scientific techniques for identifying asbestos fibers, the improved test method required that laboratories "analyze the individual strata or layers and report a single result for each layer." *Id.* Thus, regardless of which scientific technique is used to detect asbestos fibers (PLM or otherwise), laboratories are no longer permitted to average or combine the amount of fibers in each layer to determine the asbestos quantity of the whole system. The EPA explains the previous method for analyzing bulk samples--the averaging test method--is disfavored because "multi-layered samples which may contain asbestos in a single layer may have been reported by laboratories as nonasbestos-containing." *Id.* The averaging test method, therefore, had the effect of diluting the quantity of asbestos present in a system, thereby preventing the application of NESHAP in some instances.

The new test method was intended to address this shortcoming: "a multi-layered sample which

previously was determined to be nonasbestos-containing may now have layers which will be classified as asbestos-containing based on the presence of asbestos in greater than 1 percent." 59 Fed.Reg. 38970. It is clear, therefore, that the EPA did not consider the change a mere interpretation. Rather, the EPA's description of the resulting differences between the two tests suggests a substantive change. The Notice of Advisory indicates the impetus behind the change was not to clarify ambiguities; rather, it was to expand the scope of regulated asbestos material.

*8 The Government nevertheless argues the clarifications are merely interpretations of the averaging test method. Citing the key language describing the averaging test method ("When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, and then the results for each layer are combined to yield an estimate of asbestos content for the whole sample"), the Government argues that this particular language has been a source of confusion in the regulated community. Specifically, according to the Government, it is unclear "how the first clause and the second clause of the sentence fit together in the regulatory scheme," whether "a value of greater than 1% on both a single strata AND the whole [is] required for NESHAP applicability, or whether a value of greater than 1% under either clause could result in NESHAP applicability." (Response at 47-48) (original emphasis). The Government contends the 1994 and 1995 clarifications were intended to address these ambiguities. Citing *Chevron U.S.A.*

*Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Government argues the EPA's interpretation is reasonable and, therefore, entitled to deference. (*Id.* at 47-49.)

These arguments are unpersuasive for two reasons. First, even assuming the language of the averaging test method is ambiguous, the clarifications do not address the ambiguities identified by the Government. Nor do the clarifications address any ambiguities that may be read into the statute. Rather, the clarifications have the effect of fashioning a new test method, by discarding the second step of a two-step analysis. Second, even assuming the clarifications constitute an interpretation of an ambiguous regulation, it is unclear whether *Chevron* deference is appropriate in the criminal context. Under *Chevron,* an agency's interpretation of ambiguous statutory language is entitled to deference because of the agency's delegated authority to administer the statute. 467 U.S. 837. The same consideration underlies deference to an agency's interpretation of its own regulation. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Several courts, however, have questioned whether such deference is appropriate in the criminal context. *See United States v. Douglas*, 974 F.2d 1046, 1048, n. 1 (9th Cir.1992); *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C.Cir.1987). Having concluded that the clarifications do not address any alleged ambiguity in the underlying regulation, deference is inappropriate under the circumstances in any event.

Finally, the Government argues that under the

"credible evidence" rule, set forth at 40 C.F.R. 61.12, it is entitled to use any credible evidence to establish that Defendants committed the crimes charged. (*See* Supplemental Response.) Under this rule, the Government believes it is not limited to a specific test method, but may use any credible evidence to establish a violation. The credible evidence rule, however, is an evidentiary-based rule that assumes a properly alleged indictment. Accordingly, whether the Government can prove at trial that the pipe wrap contains more than 1% asbestos under either the averaging or single-layer test method is irrelevant to whether the defect in the Indictment constitutes a "fatal flaw" requiring dismissal.

*9 The single layer test method is therefore a legislative rule, the promulgation of which requires adherence to rulemaking procedures mandated by the APA. Because the single-layer test method was not subject to such rulemaking procedures, it is not binding and does not replace the earlier promulgated averaging test method. Accordingly, it may not provide the basis for the Government's prosecution. The Government's failure to allege that the pipe wrap contains more than 1% asbestos as determined by the "specified" 1990 NESHAP test method renders the Indictment defective. Moreover, the failure to allege this element illustrates the flaw in the Indictment, as the grand jury never was presented with evidence that the pipe wrap contained more than 1 % asbestos as determined by the averaging test method. It is undisputed the Government proceeded under the single-layer test method. Therefore, the grand jury could not have found that the pipe wrap contained more than 1%

asbestos under the specified test method.

**B. *Second Element of RACM: Category of ACM***

The second element of RACM concerns the nature of ACM involved. The NESHAP specifies four categories of RACM: (1) friable asbestos material; (2) Category I nonfriable ACM that has become friable; (3) Category I nonfriable ACM that will be or has been subjected to sanding, grading, cutting, or abrading; and (4) Category II nonfriable ACM that has a "high probability" of becoming friable due to "forces expected to act on the material in the course of demolition or renovation...." 40 C.F.R. § 61.141. Here, the Indictment does not allege the particular category of RACM involved.

An allegation regarding the nature of ACM requires the Government to show, and the grand jury to find, that the material falls within one or more of the four defined categories of RACM. The category of ACM also determines what evidence the Government must present to obtain an indictment. For example, if the material contains friable asbestos, the Government must introduce evidence that the material, "when dry, can be crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. § 61.141. If Category I material is involved, the Government must show that the material has either "become friable," or "will be or has been subjected to sanding, grinding, cutting, or abrading." *Id.* On the other hand, if the material is Category II, the Government must show that the material "has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the

forces expected to act on the material in the course of demolition." *Id.*

"An indictment which specifically states all elements of the offense [ ] ensures that the grand jury charged such an offense and that critical parts of the charged offense were not subsequently contributed by the prosecutor alone." *United States v. Diecidue*, 603 F.2d 535, 546-7 (5th Cir.1979). Here, it is unclear whether the grand jury considered evidence regarding any or all of the categories of ACM because the Indictment does not allege this element.

### C. *The Government's Failure to Allege the Elements of RACM Requires Dismissal*

***10** An indictment must allege each essential element of the offense to insure that a defendant does not face punishment for a crime except "on a presentment or indictment of a Grand Jury." *See United States v. Vinyard*, 266 F.3d 320, 325 (4th Cir.2001); *see also* U.S. Const. Amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ..."). Therefore, an indictment that fails to allege an essential element of the offense cannot be rescued by a bill of particulars. *Russell v. United States*, 369 U.S. 749, 770 (1962); *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir.1994) ("It is well-settled [ ] that a bill of particulars cannot cure an otherwise invalid indictment."). This is so because the validity of an indictment depends on whether the grand jury has found probable cause as to each element of the

offense. *United States v. Hooker*, 841 F.2d 1225, 1227 (4th Cir.1988).

As discussed, to sufficiently charge a violation of the work practice standards, the Indictment must allege not only that the demolition project meets the size threshold (*i.e.*, over 260 linear feet), but also that the asbestos containing material contains more than 1% asbestos as determined by the specified test method and that the material falls within one of four defined categories of RACM. Here, the Indictment fails to allege these elements, let alone facts supporting a conclusion that the pipe wrap is RACM and subject to work practice standards. The Indictment neither discloses the test method relied on by the Government, nor that the pipe wrap actually meets the threshold requirement of more than 1% asbestos. That the Government in fact relied on a test method, other than as specified in the 1990 NESHAP, highlights the Indictment's defect. Additionally, the nature of material involved, whether it is friable, or Category I or Category II nonfriable ACM, is not alleged.

Defendants argue dismissal is required because the Indictment's deficiency is "jurisdictional" in nature. (Motion at 38.) Although Defendants (and other courts) have characterized the failure to allege an essential element of an offense as "jurisdictional," the Supreme Court has held that "analysis of that issue in terms of 'jurisdiction' [is] mistaken." *United States v. Cotton*, 535 U.S. 625, 631 (2002) (citations omitted). The objection that the indictment does not charge a crime goes "to the merits of the case." *Id.* at 630. (citations omitted). In any event, no matter how

the defect is characterized, dismissal is required if an indictment fails to allege an essential element and the defect is timely raised. *Omer*, 395 F.3d at 1088; *United States v. Velasco-Medina*, 305 F.3d 839,846-47 (9th Cir.2002); *United States v. Du Bo*, 186 F.3d 1177, 1179-81 (9th Cir.1999).

It is well-established that "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment." *Omer*, 395 F.3d at 1088 (trial court wrongfully denied defendant's pre-trial motion to dismiss based on indictment's failure to allege materiality). Similarly, in *Du Bo*, the Ninth Circuit reversed a defendant's conviction because the indictment was "fatally flawed" for failing to allege the necessary *mens rea*. *Du Bo*, 180 F.3d at 1179. The court in *Du Bo* held the failure to properly allege the elements of the offense "constitutes a fatal defect that cannot be cured through jury instructions, because a 'completely missing essential element' leaves 'nothing for the petit jury to ratify." *Id.* "Failing to enforce this requirement would allow a court to 'guess as to what was in the minds of the grand jury at the time they returned the indictment....' " *Id.* (citation omitted). [FN4]

> FN4. In *Velasco-Medina*, the court limited the remedy of automatic dismissal to cases where, as here, the defect in the indictment is raised pretrial. *Velasco-Medina*, 305 F.3d at 846. "Untimely challenges to the sufficiency of an indictment [raised for the first time on appeal]

are reviewed under a more liberal standard," that of plain error. *Id.* Thus, instead of automatic dismissal, the court asks whether "an error or omission in an indictment worked to the prejudice of the accused." *Id.* at 847. Because Defendants move to dismiss pretrial, they need not show prejudice. *Du Bo*, 186 F.3d at 1179.

***11** The Government cites *United States v. Fitzgerald*, 882 F.2d at 399, for the proposition that "an indictment which tracks the words of the statute charging the offense is legally sufficient so long as it sets forth unambiguously all elements to constitute the offense." (Response at 44.) The problem with this argument is that while the Indictment tracks a portion of the "statute," it does not track the entire statute. *See United States v. Pickett*, 353 F.3d 62, 66 (D.C.Cir.2004) (overturning conviction where indictment did not allege all elements of offense because it tracked only a portion of statute).

In *Pickett*, the government attempted to charge an offense under 18 U.S.C. § 1001(a)(2), for making a false statement in a matter within the jurisdiction of the legislative branch of the government of the United States. [FN5] 353 F.3d at 66. Pickett challenged the indictment, arguing the indictment's allegation that the false statement was "within the jurisdiction of the legislative branch" was insufficient because it failed to allege the charged conduct fell within the specifications of 18 U.S.C. § 1001, subsections (c)(1) or (2), which require that the statement be made during administrative matters or an investigation or review of Congress. [FN6]*Id.* The

government argued that the indictment was sufficient because it tracked the language of the statute, and that the subsections in question were not "elemental." *Id.* The government apparently argued the subsections merely defined categories of statements that were within the jurisdiction of the legislative branch. The court disagreed, noting that: "an indictment that charges a false statement made in a mater within the jurisdiction of [the legislative] branch without alleging that it was within one of the statutory categories has not charged an offense." *Id.* The court also recognized the general proposition--as argued by the government--that "federal laws usually list all offense elements in a single sentence," but pointed out that Section 1001 was an exception to the general rule. *Id.* at 67-68 (concluding the "requirements of § 1001(c) are elements" of the offense). Because the indictment omitted language "*essential to the definition of the offense,*" the court dismissed the indictment. *Id.* at 67 (emphasis added).

> FN5. 18 U.S.C. § 1001(a)(2) provides: "(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--... (2) makes any materially false, fictitious, or fraudulent statement or representation ... shall be fined under this title or imprisoned not more than 5 years, or both."
>
> FN6.18 U.S.C. § 1001(c)(1) & (2) provide: "(c) With respect to any matter within the

jurisdiction of the legislative branch, subsection (a) shall apply only to--(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress...."

The *Fitzgerald* case, cited by the Government, is also instructive. There, the statute at issue involved "assault resulting in serious bodily injury" under 18 U.S.C. § 113(f). [FN7]882 F.2d at 399. Fitzgerald argued the indictment was defective because it lacked factual allegations "defining" the element of serious bodily injury. *Id.* The court disagreed, holding the indictment was sufficient because it tracked the statute, alleging "the date, location and victim of the offense, and it specifically charge[d] that the assault perpetrated by Fitzgerald directly resulted in the serious bodily injury of the named victim." 882 F.2d at 399. The court further held that the element of serious bodily injury is a "common sense" determination for the jury to decide. *Id.* n. 2. In other words, simply alleging "serious bodily injury" is sufficient because the term is readily understood in its ordinary sense. It need not be further defined.

FN7.18 U.S.C. § 113(f), states: "Whoever,

within the special maritime jurisdiction and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows: ... (f) Assault resulting in serious bodily injury, by fine of not more than $10,000 or imprisonment of not more than 10 years, or both."

*12 In contrast, RACM is a term of art defined in a dense regulatory scheme. The elements of RACM (and the work practice standards) emerge only by an expedition through the Clean Air Act and the NESHAP regulatory scheme, and a cobbling together of relevant regulatory provisions. To allow an indictment to stand that simply declares the material to be "RACM," without alleging the elements "essential to the definition of [an] offense" based on RACM, *Pickett*, 353 F.3d at 67, and the facts and circumstances supporting such a conclusion, would be contrary to *Du Bo:* "Failing to enforce this requirement would allow a court to 'guess as to what was in the minds of the grand jury at the time they returned the indictment." [FN8] 180 F.3 at 1179.

FN8. While it is undisputed the Government did not present evidence to the grand jury concerning the first element of RACM--more than 1% asbestos as determined by the test method specified in the 1990 NESHAP--it is unclear what was presented to the grand jury regarding the second element of RACM, *i.e.*, the nature of ACM.

## IV.

### *CONCLUSION*

For these reasons, the Court dismisses without prejudice Counts 1, 2, 3 and 5 of the Indictment for failure to set forth unambiguously all elements of the charged offenses. All dates as to Defendants Kyle Rheubottom and Jacquelyn Mc Hugh are vacated, as all counts against these Defendants are dismissed.

**IT IS SO ORDERED.**

Not Reported in F.Supp.2d, 2006 WL 3913457 (S.D.Cal.)

# DOCUMENT 14

## Trial Court Stipulation

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

| | |
|---|---|
| STATE OF WISCONSIN,<br><br>Plaintiff,<br><br>v.<br><br>WISCONSIN CENTER DISTRICT; GRUNAU/HUNT, a Joint Venture; GRUNAU PROJECT DEVELOPMENT, INC.; HUNT CONSTRUCTION GROUP, INC.; and HARENDA ENTERPRISES, INC.,<br><br>Defendants. | Case No.: 03-CV-6540 |

**STIPULATION**

The State of Wisconsin ("the State") and Harenda Enterprises, Inc. (HEI), by their undersigned counsel, hereby stipulate as follows.

1. The State and HEI hereby stipulate that if HEI is held liable in this matter in the trial court

and said liability is affirmed after exhaustion of all timely appeals to Wisconsin Court of Appeals, the Wisconsin Supreme Court and the U.S. Supreme Court, the amount of money for which HEI shall be held liable and the amount of the judgment shall be $37,138.50, broken down as follows.

| | |
|---|---|
| Principal Amount under Wis. Stat. §285.87(1): | $25,000.00 |
| Assessment under Wis. Stat. §757.05: | 6,000.00 |
| Environmental Assessment under Wis. Stat. §299.93: | 2,500.00 |
| Costs under Wis. Stat. 814.63(1)(b): | 25.00 |
| Crime Lab and Drug Assessment: | 7.00 |
| Court Services Fee under Wis. Stat. 814.634(a)(a): | 68.00 |
| Jail Assessment under Wis. Stat. §814.63(3)(ag) | 250.00 |
| Justice information fee under Wis. Stat. §814.635 | 9.00 |
| Prosecution clerks surcharge under Wis. Stat. 814.75(22) | 3.50 |
| Costs under Wis. Stat §814.01: | 3,274.00 |
| Total: | $37,138.50 |

2. To the extent that the State succeeds in otherwise meeting its burden of proof in this case and to the extent that HEI does not prevail in its defenses, HEI stipulates that, for this case only, it is an "operator" as that term is defined in NR447.02(30). This stipulation applies to this lawsuit only, and has no binding precedent in future proceedings against HEI for alleged asbestos violations.

3. The State and HEI stipulate that the asbestos testing results from the various laboratories that each party submitted to the trial court in connection with the summary judgment motions and any other motions are accurate within the analytical testing method that each respective laboratory utilized, within the variances/margin of error applicable to the test method utilized, and within the judgment of the laboratory analyst. Nothing in this Stipulation shall be construed to be a waiver of arguments HEI made in the trial court and evidence HEI submitted concerning "analytical variability." All such arguments are preserved. In addition, this stipulation applies only to analytical laboratory testing, and does not apply to sampling of material prior to it being sent to the laboratory for analytical testing.

4. The State and HEI stipulate that there are no defects in the "chain of custody" pertaining to the handling and transmittal of samples from the point of sampling to the laboratory sufficient to render the analytical test results inadmissible.

5. Other than as provided in this Stipulation, the parties stipulate that all arguments the parties proffered to the trial court are preserved for appeal, including without limitation the right to contend on appeal that the trial court improperly granted and/or denied motions filed by the parties, and including without limitation HEI's argument that the State failed to meet its burden of proof on all issues, except that for the purpose of this lawsuit HEI has stipulated that it is an "operator" as provided in paragraph 1 above.

6. If HEI is held liable in the trial court, the State stipulates to a stay of execution of judgment until 30 days after a final order affirming the trial court judgment following exhaustion of all timely appeals to the Wisconsin Court of Appeals, the Wisconsin Supreme Court and the U.S. Supreme Court. If HEI seeks review in the U.S. Supreme Court, and if the U.S. Supreme Court either denies review or affirms a judgment in favor of the State, HEI shall pay 12 percent interest on the $37,138.50 stipulated amount under Wis. Stat. 815.05(8), but the interest shall start to run from the date of a determination in the Wisconsin Supreme Court either denying review or affirming the trial court judgment.

Dated this 8th day of June 2005.

PEGGY A. LAUTENSCHLAGER
Attorney General

/s/ Jeffrey M. Gabrysiak
JEFFREY M. GABRYSIAK
Assistant Attorney General
State Bar No. 1005245

Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-9619

Dated this 8th day of June 2005.

LITCHFIELD CAVO

/s/ Mark W. Rattan
MARK W. RATTAN
State Bar No. 1016320

Attorney for Harenda Enterprises, Inc.

13555 Bishop's Ct #230
Brookfield, WI 53005-6224
(262) 784-8966

# DOCUMENT 15

## ORDER CONCERNING SUMMARY JUDGMENT MOTIONS, OTHER MOTIONS AND SCHEDULING

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

| | | |
|---|---|---|
| STATE OF WISCONSIN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | Case No.: 03-CV-6540 |
| WISCONSIN CENTER DISTRICT; GRUNAU/HUNT, a Joint Venture; GRUNAU PROJECT DEVELOPMENT, INC.; HUNT CONSTRUCTION GROUP, INC.; and HARENDA ENTERPRISES, INC., | ) | |
| | ) | |
| Defendants. | ) | |

**ORDER CONCERNING SUMMARY JUDGMENT MOTIONS, OTHER MOTIONS AND SCHEDULING**

This cause coming to be heard on the motions for summary judgment filed by plaintiff State of Wisconsin and by defendant Harenda Enterprises, Inc. (HEI), and upon the motions to strike filed by

HEI, due notice having been given to all parties entitled thereto, the Court having been advised in the premises, the Court having held a hearing on November 1, 2004, and the parties having appeared by attorney Jeffrey M. Gabrysiak for the State of Wisconsin and by Mark W. Rattan for HEI,

IT IS HEREBY ORDERED THAT:

1. The motion for summary judgment filed by the State of Wisconsin on August 25, 2004 is denied for the reasons stated on the record at the hearing on November 1, 2004.

2. The motion for summary judgment filed by HEI on June 17, 2004 is denied for the reasons stated on the record at the hearing on November 1, 2004.

3. HEI's Motion To Strike The State's Reply Brief And Other Submissions filed on October 21, 2004 is denied for the reasons stated on the record at the hearing on November 1, 2004.

4. HEI's Amended Motion To Strike The Affidavit Of Warren Merkel filed on October 26, 2004 is denied for the reasons stated on the record at the hearing on November 1, 2004.

5. The Court is adjourning a ruling on the issue whether two "clarifications" issued by the Environmental Protection Agency dated January 5, 1994 and December 19, 1995 were properly passed into rule by the proper rule making procedures. The issue will be resolved in accordance with a motion in

limine to be filed by HEI under the following briefing schedule.

a. On or before November 30, 2004, HEI is to mail to the Court and opposing counsel its motion in limine, supporting brief and other papers on the above referenced issue. HEI is to include with the motion any related matters it believes the Court should address on this issue.

b. On or before December 31, 2004, the State is to mail to the Court and opposing counsel its brief in opposition and other opposition papers to the motion in limine.

c. On or before January 14, 2005, HEI is to file its final reply brief and other papers in support of the motion.

6. The Court will hear the motion in limine on either January 31, 2005 if another major trial the Court must hear settles or is otherwise resolved prior to January 31, 2005. Alternatively, the Court will hear the motion on April 25, 2005.

7. If the Court's other major case does not settle or otherwise resolve prior to January 31, 2005, and if the parties hereto wish to have an alternate judge hear the motion in limine, the parties are to contact the Court's clerk.

8. The November 8, 2004 date for pre-trial submissions and the November 12, 2004 pre-trial conference are adjourned pending resolution of the motion in limine above. The Court will set a date for pre-trial submissions and a pre-trial conference at the January 31, 2005 or the April 25, 2005 hearing on the motion in limine.

9. Per a telephone conference between the Court and counsel convened on November 4, 2004, this matter is scheduled for a one-week trial commencing on June 6, 2005 at 1:00 p.m.

Dated this 20th day of December, 2004.

/s/ Kitty K. Brennan
Honorable Kitty K. Brennan
Circuit Court Judge

THIS ORDER WAS DRAFTED BY:
Mark W. Rattan
Litchfield Cavo
13555 Bishops Court, Suite 230
Brookfield, Wisconsin 53005-6224
Phone: (262) 784-8966
Fax: (262) 784-8818

# DOCUMENT 16

## Trial Court Order Denying Motion In Limine

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY BRANCH 6

| | | |
|---|---|---|
| STATE OF WISCONSIN,<br><br>Plaintiff,<br><br>v.<br><br>WISCONSIN CENTER DISTRICT; GRUNAU/HUNT, a Joint Venture; GRUNAU PROJECT DEVELOPMENT, INC.; HUNT CONSTRUCTION GROUP, INC.; and HARENDA ENTERPRISES, INC.,<br><br>Defendants. | ) | Case No.: 03-CV-6540<br>Unclassified - Civil: 30703 |

**ORDER**

The defendant Harenda Enterprises, Inc., filed a Motion In Limine to Exclude Evidence of the State's Asbestos Test Results. A hearing was held on the motion on April 25, 2005. At that hearing, defendant Harenda appeared by Attorney Mark W. Rattan and the State of Wisconsin appeared by

Assistant Attorney General Jeffrey M. Gabrysiak. For the reasons stated by the Court at the conclusion of the hearing, the Court HEREBY ORDERS as follows:

1. The defendant's motion to exclude all test results based on the alleged failure to follow the "Interim Method" as it applies to layered samples is DENIED.

2. The defendant's motion to exclude test results from the "1990 AHERA Report" or the "1990 Milwaukee Report" is GRANTED.

Dated this 10 day of May, 2005.

/s/ Kitty K. Brennan
KITTY K. BRENNAN
Milwaukee County Circuit Court Judge

# DOCUMENT 17

## Findings Of Fact And Conclusions Of Law

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

| | | |
|---|---|---|
| STATE OF WISCONSIN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| WISCONSIN CENTER DISTRICT; GRUNAU/HUNT, a Joint Venture; GRUNAU PROJECT DEVELOPMENT, INC.; HUNT CONSTRUCTION GROUP, INC.; and HARENDA ENTERPRISES, INC., | ) | Case No.: 03-CV-6540 |
| | ) | |
| Defendants. | ) | |
| | ) | |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This cause coming to be heard on the motions for summary judgment of plaintiff, the State of Wisconsin, and defendant, Harenda Enterprises, Inc., and the Stipulation executed by counsel of the State of Wisconsin and Harenda Enterprises, Inc. on June 8, 2005 ("the Stipulation"), due notice having

been given to all parties entitled thereto, the Court having been advised in the premises, and having held a hearing on June 8, 2005 attended by attorney Jeffry M. Gabrysiak for the State of Wisconsin and by attorney Mark W. Rattan for Harenda Enterprises, Inc.,

NOW, THEREFORE, based upon the Stipulation, the facts in the record, and the submissions by the parties, and all other matters in the record, the Court hereby makes the following Findings Of Face And Conclusions Of Law, grants the State of Wisconsin's motion for summary judgment, and denies Harenda Enterprises, Inc.'s motion for summary judgment accordingly.

## FINDINGS OF FACT

1. Plaintiff, the State of Wisconsin ("the State"), is a body politic and government unit that is part of the United States having its seat of government and principal office located at the State Capitol in the State of Wisconsin, County of Dane, City of Madison.

2. Defendant, Harenda Enterprises, Inc. ("HEI") is a corporation organized and existing under the laws of the State of Wisconsin with its principal place of business located at 21675 Doral Road, Unit C, in the County of Waukesha, City of Waukesha, State of Wisconsin, 53186.

3. The Wisconsin Center District ("WCD") is a government body created in 1994 to fund, build and operate the Midwest Airlines Center in

downtown Milwaukee, and to own, operate and build other venues in the City of Milwaukee.

4. Prior to June 2001, the WCD decided to renovate a facility located at 500-510 West Kilbourn Avenue in the City of Milwaukee, State of Wisconsin, that was originally constructed in 1904 and was known as the Milwaukee Auditorium ("the Auditorium").

5. In June, 2001 the WCD, in its capacity as the owner of the Auditorium, retained HEI to conduct an inspection of the Auditorium for possible asbestos-containing materials (ACM) prior to the anticipated renovation.

6. HEI undertook an inspection of the Auditorium in June 2001 and in January 2002 to determine whether the facility contained ACM, and if so, the amount of the ACM.

7. HEI's pre-demolition inspection identified the existence of ACM in 5,670 linear feet of pipe insulation, 64 square feet of tank insulation, 54 fire doors, a stage curtain, 19,262 square feet of mastic, 1,805 square feet of stair tread, 27,802 square feet of ceiling tile, and 500 square feet of transite in various locations in the Auditorium.

8. HEI's pre-demolition inspection in January 2002 included taking samples of material from walls of an area of the Auditorium identified as the second floor bowl area (hereinafter referred to as "the disputed area").

9. The laboratory test results of the wall samples HEI took in the disputed area indicated that none of the samples contained greater than 1% asbestos under the method that the testing laboratory used.

10. The State, through its contractual representative on the site, the Milwaukee Department of Neighborhood Services (DNS), undertook testing for asbestos in the disputed area by taking three samples of material from walls in the disputed area of the Auditorium on March 21, 2002.

11. The laboratory test results from the State's March 21, 2002 sampling event showed that one layer of one of the samples contained greater than 1% asbestos under the testing method the State used, and the remaining samples were "non-detect" for asbestos. The laboratory that tested the samples from the March 21, 2002 sampling event further determined the following:

a. That the one layer of the sample that contained greater than 1% asbestos, designated Sample No. MA-3II, contained 2% asbestos by "polarized light microscopy" (PLM) testing and 1.75% asbestos by point counting;

b. That the sample contained a total of two layers of material; and

c. That other layer, designated Sample No. MA-3, was non-detect for asbestos.

12. Demolition activities of the disputed area were commenced in March 2002 by Walters Wrecking, the demolition contractor. Ordinarily, the Court would determine the exact date that demolition activities commenced and the exact date the demolition activities ceased in the disputed area, because, under the regulations discussed in the Conclusions Of Law section, *infra*, each day of demolition of ACM without the abatement regulations being followed is a separate violation of the regulations, and the number of days of violation is a factor for the Court to consider in determining the amount the defendant should pay under Wis. Stat. §285.87(1) for violations of NR 447. The parties have stipulated to the amount HEI should pay under Wis. Stat. §285.98(1), however, so findings by the Court concerning the number of days of the violation are not necessary to resolve the case.

13. The State, through the DNS, undertook additional testing for asbestos in the disputed area of the Auditorium on April 2, 2002 by collecting three more samples of material that had been demolished between the March 2002 date when demolition began and the April 2, 2002 date of the sampling event.

14. The laboratory test results from the State's April 2, 2002 sampling event showed that the samples contained 2%, 1.25% and 2.5% asbestos, respectively, under the testing method that the laboratory used.

15. The State undertook additional testing for asbestos in the disputed area of the Auditorium on April 4, 2002 by collecting ten samples of plaster material that had been demolished between the March 2002 date when demolition began and the April 4, 2002 date of the sampling event. HEI was provided a "split" of each of those ten samples so that HEI could have those samples tested by its own independent laboratory.

16. The state's laboratory test results from the State's April 4, 2002 sampling event showed the following under the testing method the laboratory used.

a. Field Sample Nos. 7 through 10 with corresponding Lab Nos. 965571-74 were all non-detect for asbestos.

b. Field Sample Nos. 2 and 5 with corresponding Lab Nos. 954566 and 954569, respectively, each contained a layer of wall material containing greater than 1% asbestos, but the overall percent asbestos content for the entire sample when the numerical results of all layers were combined was 1% or less.

c. Field Samples Nos. 3 and 6 with corresponding Lab Nos. 954567 and 954570, respectively, each contained a layer of wall material containing 1% asbestos, and the overall asbestos content for the entire sample when the

numerical results of all layers were combined was less than 1%.

d. Field Sample No. 1 with corresponding Lab No. 951148 was a single layer "skim coat" sample that tested out as containing 2.2% asbestos.

e. Field Sample No. 4 with corresponding Lab No. 954568 was a single layer "skim coat" sample that tested out as containing 5% asbestos.

17. The testing results from the independent laboratory to which HEI sent the split samples from the April 4, 2002 testing event, Carolina Environmental, showed the following under the testing method that the laboratory used.

a. Field Samples Nos. 7 through 9 with corresponding Lab Nos. A28102-04 were all non-detect for asbestos.

b. Field Sample Nos. 1 and 4 with corresponding Lab Nos. A28096 and A28099, respectively, were single layer samples that tested out as containing 2% asbestos.

c. Field Sample No. 2 with corresponding Lab Nos. A28097A and A28097B, Field Sample No. 3 with corresponding Lab. Nos. A28098A and A28098B, Field Sample No. 5 with corresponding Lab

Nos. A28100A and A28100B, Field Sample No. 6 with corresponding Lab Nos. A28101A and A28101B, and Field Sample No. 10 with corresponding Lab Nos. A28105A and A28105B each contained a layer of wall material containing 2% asbestos, and a layer of wall material that was non-detect for asbestos.

d. The laboratory did not mathematically combine the numerical results for each layer of the respective samples referenced in sub paragraph c. above to obtain the overall asbestos content of each sample.

18. The Court finds that there is no dispute concerning the above recited facts, and that the Court can enter summary judgment as a matter of law.

## CONCLUSIONS OF LAW

19. Wis. Stat. §285.11 authorizes the Wisconsin Department of Natural Resources (WDNR) to promulgate rules implementing clean air standards consistent with Ch. 285 generally and its federal counterpart, the Clean Air Act (CAA), 42 U.S.C. §7401 *et. seq.*

20. Per authority of Wis. Stat. §285, the WDNR promulgated rules concerning asbestos inspection, identification and abatement that are codified in the NR 447 series of regulations,

Wisconsin Administrative Code, following observance of proper administrative rulemaking procedures under the Administrative Procedure And Review Act, Wis. Stat. §227.01 *et. seq.*

21. The asbestos regulations contained in NR 447 are patterned after the federal National Emission Standards For Hazardous Air Pollutants (NESHAP), 40 CFR §61.140 *et. seq.* The NESHAP regulations for asbestos were enacted pursuant to §112 of the federal Clear Air Act (CAA), 42 U.S.C. §7412, following the observance of proper administrative rulemaking procedures under the federal Administrative Procedure Act, 5 U.S.C. §553.

22. The NR 447 regulations apply to "all air contaminant sources which may emit asbestos, to their owners and operators and to any person whose action causes the emission of asbestos to ambient air." (NR 447.01)

23. An owner or operator is defined as "any person who owns, leases, operates, controls or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls or supervises the demolition or renovation operation, or both." (NR 447.02(30)).

24. Prior to the renovation or demolition of a facility such as the Auditorium, an owner or operator of the facility is required to undertake an inspection of the facility for the presence of asbestos-containing materials (ACM). (NR 447.06(1))

25. The material is considered ACM if it contains "more than 1 percent asbestos as determined using the methods specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure." (NR 447.02(1)(a) and NR 447.02(1)(b)). The methods specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy, adopted by reference in NR 447.02(1)(a) and NR 447.02(1)(b), will hereinafter be referred to as the "Interim Method."

26. The State contends that two documents published by the federal Environmental Protection Agency (EPA) are to be used to interpret and apply NR 447, the NESHAP, and the Interim Method. The first document is titled "Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems," and is published in the Federal Register, Vol. 59, No. 3, January 5, 1994. The second document is titled "Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems," and is published in the Federal Register, Vol. 60, pp. 65243-44, December 19, 1995. These documents will hereinafter be referred to as "the Clarifications." For the reasons indicated in HEI's motions, supporting materials, and arguments that HEI made and that are in the court record, HEI contends that the Clarifications are not part of the Interim Method, cannot be used to interpret and apply NR 447, the NESHAP, or the Interim Method, and that test results undertaken in accordance with the Clarifications cannot be used to establish that the Auditorium contained ACM. It is undisputed that

neither the EPA nor the WDNR observed administrative rulemaking procedures under 5 U.S.C. §553 *et. seq.* or Wis. Stat. §227.01 *et. seq.* necessary to enact the Clarifications into an administrative rule.

27. For the reasons stated on the record at the hearings on November 1, 2004 and April 25, 2005, the Court finds that the results of tests undertaken in accordance with the Clarifications can be used to establish that the Auditorium contained ACM.

28. The requirements of NR 447.07 and 447.08 apply to each owner or operator of a renovation activity if the combined amount of asbestos containing material to be stripped, removed, dislodged, cut, drilled or similarly disturbed contains at least 260 linear feet on pipes or at least 160 square feet on other facility components (hereinafter referred to as a "jurisdictional amount" of asbestos).

29. The State contends that HEI violated the following provisions of NR 447:

a. Failure to adequately wet the ACM in the disputed area in violation of NR 447.08(6)(a);

b. Failure to carefully lower ACM in the disputed area in violation of NR 447.08(6)(b);

c. Failure to remove the ACM from the disputed area prior to the demolition activity in violation of NR 447.08(1);

d. Discharge of visible emissions to the outside air during the disturbance of ACM in violation of NR 447.13(1);

e. Failure of the notice of intent to renovate a facility containing ACM to accurately describe the ACM in the disputed area in violation of NR 447.07(4)(k).

30. The State must satisfy the following four-pronged burden of proof in order to establish that HEI violated the asbestos NESHAP and NR 447:

a. HEI was the operator within the meaning of NR 447.02(30);

b. A renovation occurred;

c. A jurisdictional amount of ACM was disturbed, *i.e.*, at least 160 square feet of ACM; and

d. ACM was stripped or removed without compliance with the above stated requirements of NR 447. *See* United States v. American National Can Co., 126 F.Supp.2d 521 (N.D. Ill. 2000).

31. The Court finds that the State has satisfied the first prong of its burden of proof,

because the parties have stipulated that HEI was an "operator" within the meaning of NR 447.02(30).

32. The Court finds that the State has satisfied the second prong of its burden of proof, because there is no dispute that a renovation occurred in the disputed area of the Auditorium.

33. The Court finds and concludes that the State has satisfied the third prong of its burden of proof in that disputed area contained at least 160 square feet of ACM, *i.e.*, the disputed area contained more than 160 square feet of material containing "more than 1 percent asbestos as determined using the methods specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure" within the meaning of the Interim Method and the Clarifications. (NR 447.02(1)(a) and NR 447.02(1)(b)). The Court thus finds that a jurisdictional amount of ACM was disturbed.

34. The Court finds that the State has satisfied the fourth prong of its burden of proof, because the ACM in the disputed area was not adequately wetted under 447.08(6)(a), was not carefully lowered under 447.08(6)(b), was not removed from the disputed area prior to demolition under 447.08(6)(a), was discharged to the outside air under NR 447.13(1), and the notice of intent to renovate a facility containing ACM did not accurately describe the ACM in the disputed area under NR 447.07(4)(k).

35. The Court finds and concludes that holding HEI liable under the facts and circumstances of this case does not violate HEI's substantive due process rights under the U.S. Constitution or the Wisconsin Constitution. The Court further rejects HEI's argument that the Interim Method is constitutionally void for vagueness.

36. Based upon the above findings of fact and conclusions of law, the Court will enter summary judgment in favor of the State and against HEI on HEI's liability for the above articulated violations.

37. The Court need not make findings or conclusions concerning the amount of money HEI should pay pursuant to HEI's liability under Wis. Stat. §285.87(1), because the State and HEI stipulated to the following payments to be made by HEI to the Clerk of the Circuit Court, and the Court will enter judgment accordingly:

| | |
|---|---|
| Principal Amount under Wis. Stat. §285.87(1): | $25,00000 |
| Assessment under Wis. Stat. §757.05: | 6,000.00 |
| Environmental Assessment under Wis. Stat. §299.93: | 2,500.00 |
| Costs under Wis. Stat. 814.63(1)(b): | 25.00 |
| Crime Lab and Drug Assessment: | 7.00 |
| Court Services Fee under Wis. Stat. 814.634(a)(a): | 68.00 |
| Jail Assessment under Wis. Stat. §814.63(3)(ag) | 250.00 |

| | |
|---|---|
| Justice information fee under Wis. Stat. §814.75(15) | 9.00 |
| Prosecution Clerks Surcharge under Wis. Stat. §814.75(22) | 3.50 |
| Costs under Wis. Stat §814.01: | 3,274.00 |
| Total: | $37,138.50 |

38. The State and HEI have stipulated to a stay of execution of judgment until 30 days after a final order affirming the trial court judgment following exhaustion of all timely appeals to the Wisconsin Court of Appeals, the Wisconsin Supreme Court, and the U.S. Supreme Court, so the Court will issue a stay of execution accordingly.

39. The parties have stipulated that the interest on the $37,138.50 amount of the judgment under Wis. Stat. §815.05(8) shall start to run from the date of a determination in the Wisconsin Supreme Court either denying review or affirming the trial court judgment, so the judgment the Court enters will so reflect.

Dated this 8th day of June, 2005.

/s/ Kitty K. Brennan
Honorable Kitty Brennan
Circuit Court Judge

# DOCUMENT 18

## Final Judgment In Favor Of The State Of Wisconsin

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

| | | |
|---|---|---|
| STATE OF WISCONSIN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| WISCONSIN CENTER DISTRICT; GRUNAU/HUNT, a Joint Venture; GRUNAU PROJECT DEVELOPMENT, INC.; HUNT CONSTRUCTION GROUP, INC.; and HARENDA ENTERPRISES, INC., | ) | Case No.: 03-CV-6540 |
| | ) | |
| Defendants. | ) | |
| | ) | |

**FINAL JUDGMENT IN FAVOR OF THE STATE OF WISCONSIN**

Upon the ORDER FOR FINAL JUDGMENT IN FAVOR OF THE STATE OF WISCONSIN dated June 8, 2005, IT IS HEREBY ADJUDGED THAT:

A. The State of Wisconsin ("the State") shall have and recover from defendant Harenda Enterprises,

Inc. ("HEI") the amount of THIRTY-SEVEN THOUSAND ONE HUNDRED THIRTY-EIGHT DOLLARS AND 50 CENTS ($37,138.50), payable to the Clerk of the Circuit Court of Milwaukee County, as follows:

| | |
|---|---|
| Principal Amount under Wis. Stat. §285.87(1): | $25,00000 |
| Assessment under Wis. Stat. §757.05: | 6,000.00 |
| Environmental Assessment under Wis. Stat. §299.93: | 2,500.00 |
| Costs under Wis. Stat. 814.63(1)(b): | 25.00 |
| Crime Lab and Drug Assessment: | 7.00 |
| Court Services Fee under Wis. Stat. 814.634(a)(a): | 68.00 |
| Jail Assessment under Wis. Stat. §814.63(3)(ag) | 250.00 |
| Justice information fee under Wis. Stat. §814.75(15) | 9.00 |
| Prosecution Clerks Surcharge under Wis. Stat. §814.75(22) | 3.50 |
| Costs under Wis. Stat §814.01: | 3,274.00 |
| Total: | $37,138.50 |

B. Execution on the judgment is stayed until 30 days after a final order affirming the trial court judgment following exhaustion of all timely appeals to the Wisconsin Court of Appeals, the Wisconsin Supreme Court, and the U.S. Supreme Court.

C. There shall be no interest on the judgment unless HEI seeks review in the U.S. Supreme Court following exhaustion of appeals to the Wisconsin Court of Appeals and the Wisconsin Supreme Court,

and unless the U.S. Supreme Court either denies review or affirms a judgment in favor of the State. In that event, HEI shall pay 12 percent interest on the $37,138.50 amount of the judgment under Wis. Stat. 815.05(8), but the interest shall start to run from the date of a determination in the Wisconsin Supreme Court either denying review or affirming the trial court judgment

In accordance with the provisions of Wis. Stat. §806.01(1), the places of residence of the parties are as follows:

1. The State of Wisconsin resides at the State Capitol, in the State of Wisconsin, County of Dane, City of Madison.

2. HEI resides at 21675 Doral Road, Unit C, in the County of Waukesha, City of Waukesha, State of Wisconsin, 53186.

Dated this 8th day of June, 2005.

/s/ John Barrett
John Barrett
Clerk of Circuit Court

Judgment Entered On: June 22, 2005; Judgment Docketed On: June 22, 2005;

By: /s/ Carolyn Carter.
Judgment Clerk

# DOCUMENT 19

59 FR 38970

NOTICES

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS-62136; FRL-4744-1]

Advisory Regarding Availability of an Improved Asbestos Bulk Sample Analysis Test Method; Supplementary Information on Bulk Sample Collection and Analysis

Monday, August 1, 1994

***38970** AGENCY: Environmental Protection Agency (EPA).

59 FR 38970

NOTICES

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS-62136; FRL-4744-1]

# Advisory Regarding Availability of an Improved Asbestos Bulk Sample Analysis Test Method; Supplementary Information on Bulk Sample Collection and Analysis

Monday, August 1, 1994

*38970 AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of advisory.

SUMMARY: This notice announces the availability of an improved asbestos bulk sample analysis test method for use with bulk samples collected for identification of asbestos-containing materials under the Asbestos Hazard Emergency Response Act (AHERA) regulations and the asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP). Supplementary information on the collection of bulk samples and analysis of these samples by the improved method is also provided.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St.,

SW., Washington, DC 20460, Telephone: (202-554-1404), TDD: 554-0551.

SUPPLEMENTARY INFORMATION: EPA recently developed an improved test method entitled "Method for the Determination of Asbestos in Bulk Building Materials" (EPA/600/R-93/116). Copies of the test method are available by telephoning the National Technical Information Service (NTIS) at (800)553-6847. The NTIS identifier for the test method is PB93-218576.

The test method provides clarifications and improvements to the 1982 EPA "Interim Method for the Determination of Asbestos in Bulk Insulation Samples" (as found in 40 CFR part 763 Appendix A to Subpart F). Specifically, use of the improved ***38971** method can provide more precise analytical results especially at low asbestos concentrations, enhanced analysis of floor tiles which may contain thin asbestos fibers below the limits of resolution of the polarized light microscope (PLM), and clearer instruction on the analysis of bulk materials, particularly where multiple layers are present.

The 1982 method is limited in that it does not provide guidance for analyzing materials that contain thin (<0.25 micrometers) asbestos fibers. As a consequence, floor tiles which were analyzed according to the 1982 method and for which negative results were reported may actually contain undetected asbestos. At this time EPA does not have data to support identification of other materials which may have thin fibers.

The improved method addresses the thin fiber limitation of the 1982 method by providing directions for using transmission electron microscopy (TEM). The test method includes improved procedures for reducing matrices so that fibers may be made available for microscopic analysis. The improved method also directs laboratories to analyze the individual strata or layers and report a single result for each layer. The 1982 method provided that the analytical result for a multi-layered sample with discrete strata be reported as one result across all layers. Because the 1982 method allowed the result to be reported as one number, multi-layered samples which may contain asbestos in a single layer may have been reported by laboratories as nonasbestos-containing. The improved method directs laboratories to analyze and report a result for individual layers. Thus, more than one result will be reported for multi-layered samples, and a multi-layered sample which previously was determined to be nonasbestos-containing may now have layers which will be classified as asbestos-containing based on the presence of asbestos in greater than 1 percent.

In light of the availability of the improved method, EPA recommends that local education agencies (LEAs) use the improved method in place of the 1982 procedures as found in 40 CFR part 763 Appendix A to Subpart F. EPA has made the determination that the improved method is more capable of producing accurate results than the 1982 protocol and thus serves as a preferred substitute method. Further, EPA recommends that LEAs which have PLM laboratory results indicating floor tiles to be

nonasbestos-containing (asbestos present in less than or equal to 1 percent) reconsider whether these materials may have thin asbestos fibers. LEAs should also consider whether other materials sampled previously may contain multiple layers, whether each of these layers was analyzed separately, and whether results were reported separately by layer. (Note: For purposes of this analysis, drywall or gypsum board is considered a single-layered material.) LEAs are encouraged to determine from sampling and analysis records whether multi-layered systems were sampled and analyzed separately. (A system is an integrated group of building components which form a unit, i.e., a wall system composed of a browncoat layer as well as other plaster layers.) Although there is no modification of the AHERA requirements at this time and results obtained by following the 1982 protocol and the AHERA sampling rules meet the AHERA legal requirements, it may be prudent for LEAs to assume floor tiles and multi-layered materials with previously negative results to be asbestos-containing or resample and analyze them by the 1993 EPA Test Method.

This approach should be considered for the following circumstances: (1) Floor tiles which may contain thin fibers and which were analyzed under the 1982 PLM method and found not to be asbestos-containing; and (2) materials such as hard wall and acoustical plaster, stucco or other similar multi-layered materials or systems which were not analyzed and reported by layers (discrete strata). LEAs are reminded that they are also required to comply with the asbestos NESHAP regulation when disturbing

asbestos-containing building materials. Although building owners/operators are not required by the asbestos NESHAP to collect bulk samples of building products prior to disturbance, they are responsible for knowing whether asbestos is contained in the building product. Often, identification of asbestos content may be obtained only by sampling and analyzing the material. EPA has provided guidance on how to sample and interpret analytical results for multi-layered samples for the asbestos NESHAP in the Federal Register notice of January 5, 1994 (59 FR 542). Before undertaking activities which might trigger asbestos NESHAP requirements, it is recommended that LEAs consider resampling multi-layered materials which have been found to be nonasbestos-containing for AHERA purposes or assume them to be asbestos-containing prior to disturbance according to the guidelines set forth in this current notice, in the January 5, 1994 NESHAP Federal Register notice, and in the improved analytical method to avoid potential violation of the asbestos NESHAP.

All previous positive results (asbestos present in greater than 1 percent) are acceptable regardless of the EPA method by which they were sampled or analyzed. For AHERA and NESHAP purposes, materials may always be assumed to be asbestos-containing in lieu of sampling and analysis.

EPA is in the midst of preparing a guidance bulletin to assist LEAs in implementing the recommendations discussed in this notice. The guidance will be available in summer 1994. To obtain a single copy of the bulletin, you must send a

written request for the "Asbestos Sampling Bulletin" and an 9 1/2 inch by 12 inch self-addressed and stamped envelope (at least $0.75 in postage applied to the envelope) to: TSCA Assistance Information Service, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Requests for the bulletin that are not accompanied by the self-addressed and stamped envelope will not be honored. Multiple copies are not available. Copies will be distributed only in the previously described manner.

Dated: July 21, 1994.

Lynn R. Goldman,

Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. 94-18665 Filed 7-29-94; 8:45 am]

BILLING CODE 6560-50-F

59 FR 38970-02, 1994 WL 393003 (F.R.)

# DOCUMENT 20

## Chapter 285

## Air Pollution

## 285.87 Penalties for violations relating to air pollution.

**285.87 Penalties for violations relating to air pollution.**

**(1)** Except as provided in s. 285.57 (5) or 285.59 (8), any person who violates this chapter or any rule promulgated, any permit issued or any special order issued under this chapter shall forfeit not less than $10 or more than $25,000 for each violation. Each day of continued violation is a separate offense.

**(2)** (a) Except as provided in par. (b), any person who intentionally commits an act that violates, or fails to perform an act required by this chapter, except s. 285.59, or any rule promulgated, any permit issued or any special order issued under this chapter, except s. 285.59, shall be fined not more than $25,000 per day of violation or imprisoned for not more than 6 months or both.

(b) If the conviction under par. (a) is for a violation committed after another conviction under par. (a), the person is guilty of a Class I felony, except that, notwithstanding the maximum fine specified in s. 939.50 (3) (i), the person may be fined not more than $50,000 per day of violation.

# DOCUMENT 21

## 42 U.S.C. §7413(b) and (c)

42 U.S.C. §7413(b) and (c)

**(b) Civil judicial enforcement**

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, in any of the following instances:

**(1)** Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced

**(A)** during any period of federally assumed enforcement, or

**(B)** more than 30 days following the date of the Administrator's notification under subsection (a)(1) of this section that such person has violated, or is in violation of, such requirement or prohibition.

**(2)** Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV–A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States

under this chapter (other than subchapter II of this chapter).

**(3)** Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

**(c) Criminal penalties**

**(1)** Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after

having been notified under subsection (a)(1) of this section by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 7411 (e) of this title (relating to new source performance standards), section 7412 of this title, section 7414 of this title (relating to inspections, etc.), section 7429 of this title (relating to solid waste combustion), section 7475 (a) of this title (relating to preconstruction requirements), an order under section 7477 of this title (relating to preconstruction requirements), an order under section 7603 of this title (relating to emergency orders), section 7661a (a) or 7661b (c) of this title (relating to permits), or any requirement or prohibition of subchapter IV–A of this chapter (relating to acid deposition control), or subchapter VI of this chapter (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters, and including any requirement for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter) shall, upon conviction, be punished by a fine pursuant to title 18 or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

**(2)** Any person who knowingly—

**(A)** makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);

**(B)** fails to notify or report as required under this chapter; or

**(C)** falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter [2] shall, upon conviction, be punished by a fine pursuant to title 18 or by imprisonment for not more than 2 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

**(3)** Any person who knowingly fails to pay any fee owed the United States under this subchapter, subchapter III, IV–A, V, or VI of this chapter shall, upon conviction, be punished by a fine pursuant to title 18 or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(4) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002 (a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under title 18 or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(5)

(A) Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002 (a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under title 18 or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person

under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

**(B)** In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury—

**(i)** the defendant is responsible only for actual awareness or actual belief possessed; and

**(ii)** knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant; except that in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.

**(C)** It is an affirmative defense to a prosecution that the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

**(i)** an occupation, a business, or a profession; or

**(ii)** medical treatment or medical or scientific experimentation conducted by professionally

approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subparagraph by a preponderance of the evidence.

**(D)** All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subparagraph (A) of this paragraph and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

**(E)** The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

**(F)** The term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

**(6)** For the purpose of this subsection, the term "person" includes, in addition to the entities referred

to in section 7602 (e) of this title, any responsible corporate officer.

# DOCUMENT 22

2007 WL 4326773 (S.D.Cal.)
United States District Court,S.D. California.
UNITED STATES of America, Plaintiff,
v.
SAN DIEGO GAS & ELECTRIC COMPANY, et al., Defendants.

Nos. 06cr0065 DMS, 07cr0484 DMS.

Dec. 7, 2007.

2007 WL 4326773 (S.D.Cal.)
United States District Court,S.D. California.
UNITED STATES of America, Plaintiff,
v.
SAN DIEGO GAS & ELECTRIC COMPANY, et al., Defendants.

Nos. 06cr0065 DMS, 07cr0484 DMS.

Dec. 7, 2007.

Gregory A. Vega, Patrick Q. Hall, Seltzer CaplanMcMahon Vitek, Robert M. Howard, Patricia Guerrero, Latham and Watkins LLP, Michael L. Lipman, Stacie Patterson, Coughlan Semmer and Lipman, Dorn G. Bishop, Law Office of Dorn G. Bishop, San Diego, CA, for Defendants.

**ORDER GRANTING DEFENDANTS' MOTION FOR NEW TRIAL**

DANA M. SABRAW, District Judge.

*1 On August 22, 2007, Defendants San Diego Gas and Electric Company ("SDG & E"), Kyle Rheubottom, and David Joseph Williamson filed motions for acquittal and, in the alternative, for new trial under Rules 29 and 33 of the Federal Rules of Criminal Procedure. The motions were fully briefed by the parties, and argued on September 26, 2007. On October 4, 2007, the parties submitted supplemental briefing at the request of the Court regarding the admissibility of certain samples of asbestos containing materials and the test methodology employed to determine the asbestos content of those samples.

Defendants advanced numerous grounds in support of their motions. Two grounds merit relief. The admission of scientific test results regarding the asbestos content of certain samples of pipe wrap, combined with the manner in which such results were argued to the jury, warrants a new trial as to all Defendants on the asbestos NESHAP (National Emission Standards for Hazardous Air Pollutants) work practices counts. Additionally, the inconsistent verdicts on the false statement count warrant a new trial as to Defendant SDG & E on that count. The balance of Defendants' arguments are denied.

## I.

## BACKGROUND

The facts are well known to the parties and thus, only facts relevant to the issues addressed in this Order are set forth below. Defendants SDG & E, Kyle Rheubottom, David Joseph Williamson, and Jacquelyn McHugh were among the first persons in the nation to be charged with criminal violations of asbestos NESHAP work practice standards promulgated by the Environmental Protection Agency ("EPA"). The Government alleged Defendants violated certain NESHAP work practice standards during the removal of over nine miles of asbestos-containing gas pipeline. The Government's case-in-chief included five counts: three work practices counts, one false statement count, and one conspiracy count. After the Government rested, the Court granted Defendants' Rule 29 motion and dismissed the conspiracy count as to all Defendants.

The counts in the indictment were thereafter renumbered, and the jury was charged with deciding the remaining four counts.

Counts one through three charged Defendants with various violations of the asbestos NESHAP work practice standards, including failure to provide written notice of the removal of "regulated asbestos containing material" ("RACM") in advance of the start date of the renovation operation (count one), failure to adequately wet RACM (count two), and failure to contain RACM in leak tight containers (count three). The fourth count charged Defendants SDG & E and Williamson with making a false statement to federal authorities under 18 U.S.C. § 1001.

After a lengthy trial involving numerous novel issues of law, a jury found Defendant SDG & E guilty on all counts, and Defendants Rheubottom and Williamson guilty on count three (failure to contain RACM in leak tight containers). Defendants Rheubottom and Williamson were acquitted of the remaining work practices counts. The jury deadlocked as to Defendant Williamson on the false statement count, and Defendant McHugh was acquitted of the one work practice count with which she was charged: failure to provide written notice (count one).

*2 The regulatory scheme promulgated by the EPA subjects the removal of certain "asbestos containing materials," or "ACM," to environmental oversight and regulation. Not all materials containing asbestos, and not all demolition projects, are regulated. To be "regulated," the material and

project must exceed certain thresholds regarding project size and asbestos content. Pertinent to the present motion are the following requirements: (1) the quantity of asbestos content in the ACM must exceed 1% as determined by a designated test method (40 C.F.R. § 61.141); and (2) the ACM must be "friable," that is, the material may be crumbled by hand pressure creating dust, or if initially "nonfriable," the ACM must have a "high probability" of becoming friable due to acts of disturbance during the removal process.(*Id.*) If the ACM meets these and other standards not relevant here, it is deemed to be regulated asbestos containing material, or RACM, and subject to governmental oversight and regulation through the NESHAP work practices standards. Accordingly, as a threshold to criminal culpability, the Government must prove that the material under investigation is RACM, *i.e.*, contains more than 1% asbestos and is friable or has a high probability of becoming friable. The cental issue here is whether the Government properly proved that the pipe wrap in question contained more than 1% asbestos.[FN1]

> FN1. The work practice counts share four common elements in this prosecution: (1) "defendant is a person who was an owner or operator of a renovation operation involving at least 260 linear feet of regulated asbestos containing material on pipes;" (2) "the asbestos containing material contained over 1% asbestos as determined using the method specified in Appendix E, subpart E, 40 C.F.R. part 763, Section 1, Polarized Light Microscopy;" (3) "the asbestos containing

material involved in the renovation operation was regulated asbestos containing material, that is friable asbestos containing material, or Category II nonfriable asbestos containing material that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of renovation operations;" and (4) "defendant acted with knowledge that the renovation operation involved the removal of asbestos."It is the second element that is at issue here.

To prove the pipe wrap contained more than 1% asbestos, the Government presented eighteen samples of pipe wrap to the jury. Each sample was analyzed by a laboratory, and each laboratory was represented by a witness who testified before the jury about the test procedure used by the lab to determine asbestos content. All but five of the samples were destroyed after testing. Defendants' labs tested the five existing samples ("SD-1, 2, 3, 4 & 5"), and Defendants presented their own evidence reporting the results of those tests.

Throughout the litigation, both the test procedures used to determine asbestos content and the nature of the samples tested were the subject of intense debate. These disputes, which were novel and highly technical, were the subject of several pre-trial orders issued by the Court. In its first order, the Court held that where discrete layers of ACM are identified, each layer must be analyzed for asbestos content, and the results must then be combined to determine "an estimate of asbestos content for the whole

sample."[FN2](Order, November 21, 2006, Doc. 178, Case No. 06-cr-0065, "RACM I Order"). This test method has been referred to by the Court throughout this litigation as the "averaging test."

> FN2.40 C.F.R. Pt. 763, Subpt. E, § 1.7.2.1, provides in pertinent part: "When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, and then the results for each layer are combined to yield an estimate of asbestos content for the whole sample."

The Government initially charged and indicted Defendants with work practices violations based upon a different test, one in which only a single layer was tested for asbestos content. Using the "single layer" test method, the Government determined asbestos content by testing only the layer of pipe wrap that contained asbestos (and ignoring other non-asbestos containing layers). The Court held the single layer test method was not subject to rulemaking procedures as mandated by the Administrative Procedures Act and thus, the test could not be used in place of the averaging test.[FN3](RACM I Order at 12). Because the Government relied upon single layer testing to indict Defendants, in the RACM I Order, the Court dismissed the work practices counts. Thereafter, the Government re-indicted Defendants in accordance with the RACM I Order.

> FN3. The parties did not brief and the RACM I Order did not address which test method

would apply if a sample did *not* contain discrete identifiable layers.

*3 Defendants moved to dismiss the second indictment on numerous grounds, all of which were denied by the Court. Significantly, however, the parties briefed whether a sample of ACM had to be "whole" (*i.e.*, contain all layers of the pipe wrap) in order to be used as a sample from which asbestos content could be determined. On March 29, 2007, at a hearing on Defendant's motion to dismiss, the Court ruled from the bench and held that while the NESHAP regulations do not require an intact sample, they do require a *whole* sample-that is, the sample must contain *all* layers of the material. (Order, March 29, 2007, RT 39:6-13; 44:25-45:3, "RACM 1.5 Order") Finally, on April 12, 2007, the Court determined that once layers are separated from a sample, the asbestos content of each layer is measured and averaged by volume rather than by weight-a test method referred to in this litigation as "volumetric averaging." (Order, April 12, 2007, Doc. 20, Case No. 07-cr-0484, "RACM II Order"). The RACM II Order reiterated that volumetric averaging may be "properly performed by analyzing a complete, albeit non intact sample of the asbestos material."(*Id.* at 1). Again, however, the parties did not brief and the Court did not decide what test would apply if a sample did *not* contain discrete, identifiable layers.

During trial, Defendants moved to exclude most of the Government's scientific evidence on grounds that it conformed with neither the NESHAP regulations nor the Court's RACM Orders. The Government

represented the tests were compliant with the pretrial orders.[FN4]The Court ultimately concluded that its pretrial orders were clear, and any non-compliance by the laboratories would go to the weight rather than the admissibility of the evidence in question. The Court was satisfied that any nonconformity would be revealed during cross examination and the evidence-given its probative value-was not sufficiently confusing or prejudicial to warrant exclusion. (RT 432:14-18). On these grounds, the Court allowed the Government to present the evidence. (RT 447:9-12).

> FN4. Counsel for the Government stated, "[t]he witnesses will tell you that they followed the test method in the regulations with the sample that they had."(RT 221:20-22). The Government made no representations at that time as to the representativeness of the sample, *i.e.*, whether the samples were "whole" in accordance with the RACM 1.5 Order.

## II.

## LEGAL STANDARD

The Court may grant a new trial "if the interest of justice so requires."Fed.R.Crim.P. 33. In practice, a new trial is a remedy that courts grant sparingly. *See, e.g.*, *United States v. Narciso*, 446 F.Supp. 252 (E.D.Mich.1976); *United States v. Snead*, 447 F.Supp. 1321 (E.D.Pa.1978). The Court may grant a new trial only if the error was not harmless under the same standard an appellate court would apply

under Rule 52 of the Federal Rules of Criminal Procedure. *See*Fed.R.Crim.P. 52 advisory committee's note. However, unlike a motion for acquittal, the Court need not draw all inferences in favor of the Government. "If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury."*United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir.2000).

## III.

## DISCUSSION

### *A. The NESHAP and the Court's Pretrial Orders.*

***4** The NESHAP regulations describe the process for collecting and analyzing ACM to determine asbestos content. More specifically, the Court's RACM Orders describe the type of sample required for testing, and the test method for determining asbestos content where discrete strata are identified. These matters are discussed in more detail below.

*1. Step One: Sampling*

As discussed, the Court in its pretrial orders held that a "complete" sample must be used to determine asbestos content under the averaging test. (*See, e.g.*, RACM II Order at 1 (averaging test specified in

Section 1.7.2.1 is properly performed "by analyzing a complete" sample of ACM)). After trial, Defendants refined their arguments on this issue.

Defendants now focus on Section 1.7.1 of the regulations, which provides in pertinent part, "[s]amples for analysis of asbestos content shall be taken in the manner prescribed in Reference 5.... If there are any questions about the representative nature of the sample, another sample should be requested before proceeding with the analysis."Reference 5 is a document entitled "Asbestos-Containing Materials in School Buildings: A Guidance Document."("Guidance Document"). Under the heading "How to Take a Sample," the Guidance Document states, "a representative sample should be taken from within the material itself by *penetrating the depth of the material* with a sample container."(Guidance Document at 9) (emphasis added). It further emphasizes, "be sure to *penetrate* any paint or protective coating and *all the layers of the material."*(*Id.* at 10) (emphasis added). While this precise argument was not advanced pretrial by Defendants, it is entirely consistent with the Court's pretrial orders, with one significant difference: the sampling requirements set forth in Section 1.7.1 are not limited to the volumetric averaging test, but rather apply to all samples tested under any test methodology. The Court's RACM Orders, in response to the parties' briefings and arguments, focused only on proper sampling methods for testing by volumetric averaging.

The Government advances four principal arguments that a "representative" sample as described by

Section 1.7.1 (and apparently a "whole" or "complete" sample as described in the RACM 1.5 Order) is not required. These arguments lack merit for the following reasons.

First, the Government argues the phrase "representative sample" as used in the EPA regulations refers only to a representative sample of the pipe wrap that an inspector was actually provided, regardless of whether the sample is representative of the pipe wrap as it existed on the pipe. (Oral Arg. at 9, 19-21). The Government argues that were it otherwise, a sophisticated defendant that managed to clean up most of the ACM could make it impossible for the EPA to find a representative sample of the type described in the Guidance Document, and thus hamper the Government's ability to prosecute. Inspectors, according to the Government, should therefore be able to sample and test whatever material they find, regardless of whether it is a representative sample.

*5 The regulations, however, clearly require a representative sample of ACM, not simply a sample representative of whatever material inspectors happen to find. Case law is consistent: "samples are receivable in evidence to show the quality or condition of the entire lot or mass from which they are taken. The prerequisites necessary to the admission in evidence of samples are that the mass should be substantially uniform with reference to the quality in question and that the sample portion should be of such a nature as to be fairly representative." *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F.Supp. 1, 11 (S.D.N.Y.1973) *quoting* *E.K.*

*Hardison Seed Co. v. Jones*, 149 F.2d 252, 256 (6th Cir.1945).*See also* *Otoe Co. Bank v. Delany*, 88 F.2d 238 (8th Cir.1937); *Leonard v. Uniroyal, Inc.*, 765 F.2d 560, 567 (6th Cir.1985); *Lapwai v. Alligier*, 69 Idaho 397, 207 P.2d 1025 (1949). In other words, if a sample is only representative of what inspectors encounter, it tells the fact finder nothing about the composition of the material as a whole, or, in this case, the pipe wrap on the pipe.

Further, the Government's argument that obtaining representative samples of the type required by the regulation could be difficult and sometimes impossible, thereby precluding prosecution, is purely theoretical. The Government not only could have collected representative samples from over nine miles of pipe wrap on the pipe, it did in fact collect such samples. The parties agree, for example, that SD-2 is a representative (or whole) sample of pipe wrap. In addition, even if regulatory authorities are precluded from obtaining a representative sample due to illicit cover-up efforts of an owner or operator of a renovation or demolition operation, otherwise inadmissible evidence does not become admissible on that basis alone.

Second, the Government argues the sampling methods set forth in the Guidance Document are intended for self-evaluation purposes, and are not required for compliance or admissibility in a criminal prosecution. (Oral Arg. at 5-6). Adopting this interpretation would subject owners and operators of demolition and renovation projects to arbitrary prosecution. If the Government is not required to test samples that are representative of

the suspected ACM, a party's guilt or innocence would depend entirely upon the sample collected, no matter how contaminated or unrepresentative. The Government's proposed rule would permit the following situation: a company tests ACM using a representative sample, finds it is not RACM, and on that information, properly concludes there is no obligation to comply with the NESHAP requirements. Later, after demolition or renovation activities begin, the regulatory authorities retrieve and test bits and pieces from the project that may not be representative or whole samples. If such samples reveal high concentrations of asbestos, the company would be subject to criminal prosecution for asbestos NESHAP violations even when the ACM, based upon a representative sample, is not RACM. Such a result would violate basic principles of due process, which "require[ ] legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement" of the law. *Smith v. Goguen*, 415 U.S. 566, 572-73, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974).[FN5]

FN5. The Government alluded to a related argument during oral argument that test methods may differ between criminal and civil enforcement matters. (Oral Arg. at 95). In support, the Government cited the Ninth Circuit's recent decision in *United States v. W.R. Grace*, 504 F.3d 745, 2007 WL 2728767 (9th Cir.2007), in which the court acknowledged there could be two definitions of the same term depending upon the (civil or criminal) forum of enforcement. (*Id.* at *17).

> However, in *W.R. Grace,* the court noted the source of each definition. In the present case, the Government has not cited any authority for the proposition that different testing standards may apply to civil and criminal enforcement cases. Moreover, the Government has not identified any authority permitting the testing of non-representative samples.

*6 Third, the Government argues it understood the phrase "whole sample" as used by the Court in its RACM 1.5 Order to require that the whole sample *collected* be tested in its entirety, not, as Defendants argue, that the sample *itself* be a whole or representative section of pipe wrap. (Oral Arg. at 11). This argument is contrary to the record. At the RACM 1.5 hearing, the parties debated whether the sample tested had to be whole *and* intact. The Court held the regulations required a whole but not necessarily intact sample. The Court inquired of the Government whether it had any whole samples, *i.e.,* samples that "contained all the layers, albeit not intact."(RT 12:23-24). The Government responded, "SD-2 does contain all of the layers of the material."(RT 13:10-11). Clearly, it was understood by the parties that a "whole sample" meant an all-layers sample.

Fourth, the Government argues the sampling procedure outlined in the Guidance Document only applies to the sampling of "friable" material, so if material is non-friable on the pipe, no representative samples must be collected. (Gov. Supp. Brief at 5). The regulation itself belies this argument. Section 1.7.1 mandates that a representative sample of

"asbestos" be taken, without limiting such sampling to friable material. Indeed, such a limitation would make no sense. The sampling method is designed to ensure accurate testing of the composition of the whole material, which does not depend upon a determination of friability. It would be incongruous to require two different procedures for friable and non-friable asbestos. Moreover, the Government consistently has maintained that the ACM in this case, that is, the pipe wrap both on the pipe and after being stripped from the pipe, is friable. *See, e.g.*, Govt's Supp. Briefing at 5: 6-7, n. 3 (noting "vast majority" of material in this case was friable, as were many samples taken from the pipe).

Accordingly, in order to establish threshold quantities of asbestos (1% or more) to support a finding of RACM and criminal prosecution, the Government must base its showing upon a representative sample. If a sample is not representative, it is inadmissible for purposes of proving asbestos content of the ACM (pipe wrap) as a whole. The determination that a representative sample is a foundational prerequisite to admitting test results significantly impacts this case, as many non-representative samples were admitted into evidence and considered by the jury.

*2. Step Two: Testing*

Once a representative sample is collected, it must be tested by a sanctioned laboratory in accordance with the NESHAP regulations.[FN6] In addition to collecting a representative sample under Section 1.7.1, the regulations set forth a number of steps to testing,

including but not limited to, averaging when discrete strata are identified (1.7.2.1), sample preparation (1.7.2.2), fiber identification (1.7.2.3), and quantification (1.7.2.4).

> FN6. All analysts testified they had no personal knowledge of the collection or sampling procedures; they simply analyzed what they were given without knowing whether the sample was representative or not. The Government argues that for this reason, the Court should examine only the testing procedure and ignore the representative sampling step. The limited personal knowledge of the analyst, however, has no bearing on whether the sample is or ought to be representative.

*7 In simple terms, after a sample is prepared and fibers are identified, the fibers must be quantified. The proper method of quantification depends upon whether discrete layers are found during the sample preparation step. If discrete layers are not identified, the Government argues the quantity of asbestos in a homogenized sample or representative sub-sample ("pinch mounts") represents the quantity of asbestos in the entire sample, and the analysis is complete. This method of testing was not briefed by the parties, and the Court did not determine whether any of the samples complied with these test procedures.[FN7]Conversely, as discussed, where discrete strata are identified, volumetric averaging is employed. (Section 1.7.1.1).

> FN7. The propriety of homogenization or

pinch mounting is not addressed in this Order.

***B. The Government's Samples.***

Of the eighteen samples offered by the Government and admitted in evidence, twelve are described by both parties as "debris" or "waste" collected from the CRC Evans stripping machine and nearby dumpsters. ("Debris Samples"). The Debris Samples are not representative.

The Government argues the "homogenous debris from the end of the process line" was representative, since it contained all material that used to be on the pipe. (Gov. Supp. Brief at 5). This argument is without merit, as truly homogenized materials are blended into a uniform mixture. All components of the mixture are uniformly distributed throughout, ensuring that any given sample contains materials present in the same proportion as any other sample. If the pipe-stripping machine in fact homogenized all layers of the pipe wrap, the Government would be correct in asserting that any sample collected was representative. However, the Government presented no evidence that the material at the end of the process line was truly homogenous. While Penny Weir of the APCD described a "homogeneous" section of debris that included "crumbled, pulverized, and the powder [material]," (RT 498:13-17), this testimony does not demonstrate the material is homogeneous. Instead, Weir necessarily observed and collected debris in a variety of forms, all of which were broken down in varying degrees. The heterogeneous nature of the mixture likely resulted

in the collection of non-representative samples. The Government acknowledged, for example, that as to debris in the dumpsters, "you could never know whether you had samples that were representative of all layers."(Oral Arg. at 7). Because the debris in the dumpsters came from the stripping operation, the same uncertainty would apply to the debris found near the stripping machine. Under these circumstances, the Government did not establish that these samples are representative. This leaves six samples, not collected from debris, that may be representative.

*1. 1998 Keithly Sample*

The first is a sample taken by Robert Keithly of SDG & E in 1998 ("Keithly Sample"). That sample was tested by Design For Health, on whose behalf Kabir Shefa testified. Shefa found the asbestos content of that sample to be 50-60%. (Ex. 166). The parties dispute whether the sample was representative. The Government presented Keithly's testimony that he created a work order for sampling, (RT 2798:12-2805:20), which instructed the worker to "remove a six-inch square of pipe wrap for submittal to [the] lab." (RT 2804:11-13). The work order was admitted into evidence as Exhibit 374. Keithly testified, "when you normally talk about pipe wrap, pipe wrap goes down to the pipe itself."(RT 2828:23-2829:3). The person who collected the sample did not testify. Keithly also testified that the sample was "about an eighth to a quarter of an inch thick," which is much thinner than the FBI's minimum estimation of the thickness of the pipe wrap. (RT 2831:14-16).

*8 The parties also dispute whether the sample was properly tested. The Government concedes Shefa "did not ... average the results to obtain overall asbestos percentage, ... so such results would not comport with the PLM method, as defined by this court in its previous rulings."(*See* Gov't's Supp. Brief at 6). Instead, the Government argues that while the Keithly Sample contained all layers, no "discrete strata" were identified, and thus a "straightforward PLM analysis" was performed.[FN8](*Id.* at 7). Defendants contend Shefa engaged in improper single layer testing, resulting in a wildly high estimation of 50-60% asbestos. (*See* Defts' Supp. Brief, Attachment "A," No. 1).

> FN8. The Government argues Shefa took "pinch mounts" in compliance with the regulations. (Supp. Brief at 1). However, Shefa never mentioned "pinch mounting," taking a "representative sub-sample," or homogenizing the material.

*2. 1999 Ninyo & Moore Samples*

The second and third potentially compliant samples were collected by Ninyo & Moore in 1999, and also were analyzed by Shefa of Design for Health. According to Shefa, the asbestos content of the first Ninyo & Moore Sample was between 40-50%, and the asbestos content of the second sample was between 5-10%. (Ex. 167). Defendants concede that both samples are representative, but argue the test methodology was incorrect. The testimony the Government cites in support of its test on these samples is the same as that provided for the Keithly

Sample. (Gov. Supp. Brief at 2). As with the Keithly Sample, Defendants argue Shefa engaged in improper single layer testing, resulting in erratic and inflammatory results.

*3. 2003 JMR Sample*

The fourth sample was collected by an unknown person during a January 23, 2001, EPA inspection. ("JMR Sample") It was tested by JMR Environmental Services, on whose behalf Jill Brodwolf testified. The report indicates the sample contained 5% asbestos. (Ex. 57). The parties disagree about whether the sample was representative and whether the test methods were correct. The Government presented no evidence that the sample was representative. The only person who testified about the nature of the sample was Brodwolf; however, she did not testify about the collection process. She testified by referencing a chain of custody form, which indicated that Defendant Williamson gave her the sample, and that it came from a pipe. (RT 3010:5-7; 3011:6-8). From that testimony, the Government asks the Court to infer that the sample was representative because "it was taken on behalf of the defendants, who had every interest in obtaining a sample of all layers."(Gov. Supp. Brief at 7, n. 4). Defendants dispute the Government established that the sample is representative, and dispute the Government's test methodology-arguing Brodwolf performed a "calibrated visual estimation" that is neither compliant with the regulations nor the Court's pretrial orders. The Government contends Brodwolf conducted an averaging test consistent with Section

1.7.2.1.[FN9]

> FN9. Brodwolf, however, testified she analyzed each layer separately, (RT 3016:5-7), but averaged asbestos content in only asbestos-containing layers. She also did not perform "point counting" as required by the EPA regulations when the results showed less than 10%. (RT 3016:23-24).

*4. 2001 EPA Sample-"SD-1"*

The fifth sample was collected by Bob Trotter of the EPA on January 23, 2001, from a damaged portion of pipe. ("SD-1"). It was tested by Peggy Forney of the NEIC laboratory for the Government, and by Dan Van Orden of the RJ Lee Group for the defense. Because the pipe was damaged, Defendants argue it cannot be determined whether the sample is representative. The Government has shown some hesitation on this point. When asked whether the Government had any whole samples, counsel replied, "SD-2 contains all of the layers, albeit not intact. SD-1 may contain all of the layers. That is less certain because SD-1 and SD-2 are both samples taken from the same pipe, maybe 5 or 10 feet apart. The SD-1 sample was taken from an area where the top layer was disturbed. It had been like ripped, whatever, so it is unclear whether the SD-1 sample contains each and every layer."(RACM 1.5 Order, RT 12:25-13:6).

***9** The Government's report indicates the asbestos content of SD-1 is between 2.43-3.46%. (Ex. 389). Defendants' report indicates the asbestos content is at or below 1%. (Ex. 5001, 6054, 6066, 6067). The

parties agree the sample was tested in compliance with the NESHAP regulations and the Court's RACM Orders by both laboratories.

*5. 2001 EPA Sample-"SD-2"*

The sixth sample was collected by Bob Trotter on January 23, 2001, from a pipe in good condition ("SD-2"). It was tested by NEIC and the RJ Lee Group. The parties agree that the sample is representative, and that it was tested pursuant the NESHAP regulations and the Court's pretrial orders.

***C. Admissibility of Non-Representative Samples and Test Methodologies other than Volumetric Averaging.***

The Court proceeded under the assumption that the focus of argument to the jury regarding the asbestos content element would center on SD-2, as that was the sample the parties had agreed contained all layers and was tested pursuant to the volumetric averaging method discussed in the pretrial orders. Indeed, much of the evidence at trial regarding asbestos content of the pipe wrap centered on SD-2. This sample was collected by the EPA and re-tested by the NEIC to comply with the RACM I Order and volumetric averaging.[FN10] Numerous expert witnesses testified on the subject, including Peggy Forney of the NEIC, Dan Van Orden of RJ Lee Group, and other experts in fields involving photogrammetry, image analysis, materials science, environmental forensics, and environmental science. The parameters of volumetric averaging as to SD-2

(and closely related samples like SD-1), were, in the Court's mind, sufficiently defined in the pretrial orders. No additional instruction on the issue seemed necessary as: (1) the Court already had determined the averaging test method applied, (2) extensive evidence was presented at trial on volumetric averaging and SD-2, and (3) the jury was instructed on the elements of the work practices counts, including the requirement that the Government prove asbestos content by "using the method" specified in the regulations. The only "method" briefed by the parties and discussed in the pretrial orders was volumetric averaging.

> FN10. SD-1, SD-2, and three Debris Samples (SD-3, 4 & 5) were all collected by Trotter of the EPA and later re-tested under the averaging test.

Under these circumstances, the Court believed the other samples were admissible as being generally relevant on the issue of asbestos content, yet not unduly confusing or prejudicial as such samples could be distinguished from the representative sample(s) that were tested under the averaging method. The Court anticipated the defense would distinguish non-representative samples on grounds that while such samples show the presence of asbestos, the samples were of limited relevance because they either were not subjected to volumetric averaging or were not representative of the actual composition of the pipe wrap. Likewise, the Court anticipated the Government would center its arguments regarding asbestos content around representative samples tested pursuant to

volumetric averaging.

***10** Several issues have taken prominence in the post-trial briefing that were well in the background, if nonexistent, at trial. These issues include: One, whether a "representative sample" as defined in Section 1.7.1 and the Guidance Document is required before the sample may be admitted for purposes of establishing asbestos content? Two, if discrete strata are not identified in a representative sample such that volumetric averaging cannot be performed, may the Government rely on other test methodologies for determining asbestos content? Three, if so, what test method(s)? These issues were not addressed (or were not sufficiently addressed) at trial, and, given the arguments that developed at trial, should have been.

Having determined that all twelve of the Debris Samples are not representative, two of the six samples taken from the pipe may not have been representative (*e.g.*, the Keithly and JMR Samples), and four of the six samples from the pipe may not have been tested using a permissible method (*e.g.*, Keithly, Ninyo & Moore, and JMR Samples), the question becomes whether the admission of these samples and attendant results was error of a magnitude warranting a new trial. Based on these samples, the jury heard evidence that the asbestos content of the pipe wrap ranged from 1.55% to 60%. *See, e.g.*, 1998 Keithly Sample-50-60% (Ex. 166); 1999 Ninyo & Moore Samples-40-50% (Ex. 167); Debris Sample-57% (Ex. 23); Debris Sample-10% (Ex. 25); Debris Sample-11% (Ex. 26); Debris Sample-10% (Ex. 27); Debris Sample-8% (Exs.46-47).

The Government presented the evidence for the express purpose of proving an element of the case, *i.e.*, that the pipe wrap contained more than 1% asbestos.[FN11] The admission of the test results from these samples was confusing, misleading and prejudicial.

> FN11. The evidence also was relevant for proving friability. For that purpose, some of the samples may have been admissible but there would have been no need to reveal the quantity of asbestos.

As for the Debris Samples, the analysts necessarily did not test the entire material in its proper proportion. The reported results therefore proved nothing about the actual composition of the pipe wrap, regardless of the test method used. Yet, the Government urged the jury to consider all of the reports when determining whether the asbestos content exceeded 1%. In closing argument, the Government argued, "[b]ut even if you don't accept Peggy Forney's [SD-1 and SD-2] results-even if you don't accept them at all, you've heard testimony from three other laboratory analysts who analyzed the pipe wrap material from Encanto ... and all of them, every last one, found it to be greater than one percent asbestos."(RT 4917:21-25).

While the test results from non-representative samples are relevant to whether the pipe wrap is *friable,* their probative value on the issue of whether the pipe wrap contained more than 1% asbestos was-with the benefit of hindsight-substantially outweighed by undue prejudice and confusion of

issues. This is particularly so given the highly technical and scientific nature of the testimony. It is axiomatic that expert testimony can be "quite misleading because of the difficulty in evaluating it."*Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 595, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (citation omitted). Therefore, courts "in weighing possible prejudice against probative force under Rule 403 ... exercise[ ] more control over experts than over lay witnesses."*Id.* The Government presented the jury with eighteen samples, all of which contained over 1% asbestos (some as high as 60%). The evidence overwhelmingly indicated that the pipe wrap contained more than 1% asbestos, despite strenuous Defense argument that nearly all of the samples did not comply with the regulatory requirements.

*11 In addition, given the Government's argument to the jury, the Keithly, Ninyo & Moore, and JMR Samples should have been addressed pretrial by the Court and parties to determine: (1) whether the Keithly and JMR Samples were representative and therefore admissible, (2) assuming the JMR Sample is representative, whether it was tested in accordance with volumetric averaging or another NESHAP sanctioned test, and (3) assuming the Keithly Sample is representative, whether it and the Ninyo & Moore Samples (which the parties concede are representative) were tested in accordance with a NESHAP sanctioned test other than volumetric averaging.

The admission of both non-representative samples and samples tested under methods of debatable validity, combined with the manner in which such

results were argued to the jury, caused unfair prejudice and confusion of issues. Defendants presented substantial evidence regarding SD-2 (the only sample the Government demonstrated was representative), calling into question the accuracy of the Government's volumetric averaging test results. Such evidence preponderated sufficiently against the verdict that the Court is persuaded a serious miscarriage of justice occurred. For these reasons, the Court sets aside the convictions on the asbestos NESHAP counts, and grants a new trial.

***D. The False Statement Count***

On count four, false statement under 18 U.S.C. § 1001, the jury was unable to reach a verdict as to Defendant Williamson, but convicted Defendant SDG & E. SDG & E, a corporation, could be found guilty only through the acts of its agent. *See N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 491-95, 29 S.Ct. 304, 53 L.Ed. 613 (1909). Since Defendant Williamson was the sole employee whose actions could be attributed to SDG & E on this count, the verdicts are plainly inconsistent. *See, e.g., United States v. Hughes Aircraft Co.*, 20 F.3d 974, 978 n. 6 (9th Cir.1994). If the jury could not determine beyond a reasonable doubt that Williamson made a false statement, it also could not have found beyond a reasonable doubt that SDG & E, acting through Williamson, made a false statement.

While the verdicts equally could be an indication of the jury's lenity toward Defendant Williamson or of unfair prejudice to Defendant SDG & E, *see United*

*States v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943), the Court is satisfied a new trial is warranted. SDG & E could act only through its agent Williamson, and the evidence as to Williamson was the sole evidence on this count. The convictions of SDG & E on *all* counts and the inconsistency of verdicts between the Defendants, suggest a miscarriage of justice occurred and a new trial is warranted.

## III.

## CONCLUSION

For these reasons, Defendants' motion for new trial is GRANTED as to all Defendants on all counts on which they were convicted. A status conference will be held on December 21, 2007, at 11:00 a.m., at which time future dates will be set.

**IT IS SO ORDERED.**

S.D.Cal.,2007.
U.S. v. San Diego Gas & Elec. Co.
Not Reported in F.Supp.2d, 2007 WL 4326773 (S.D.Cal.), 66 ERC 1743

# DOCUMENT 23

United States Environmental Protection Agency
Office of Toxic Substances Washington, D.C. 20460
C00090 March 1979

Toxic Substances

Asbestos-Containing Materials in School Buildings:
A Guidance Document

United States Environmental Protection Agency
Office of Toxic Substances Washington, D.C. 20460
C00090 March 1979

Toxic Substances

Asbestos-Containing Materials in School Buildings:
A Guidance Document

Part 1

March 16, 1979

Dear School Officials:

Until recently exposure to asbestos was generally considered an occupational health hazard for asbestos workers. However, now we have learned of an equally serious exposure problem that can occur in all types of buildings in which certain asbestos-containing materials have been used for fireproofing, insulation, and decoration. Asbestos can be released from these materials and contaminate the building environment. Individuals who are then exposed to the asbestos could develop lung cancer or cancers of other parts of the body. Unfortunately, detection of asbestos-related diseases is difficult since the latency period between exposure and appearance of the disease is sometimes as many as 20 to 40 years.

Since these materials are found in school buildings, we at EPA are particularly concerned with the exposure of school children. EPA has worked with the States to develop a program that responds to the need for accurate information and guidance to deal

with this difficult problem. The enclosed manuals are a major part of this program and are being mailed to all public school districts. They were prepared to inform you of the health hazards associated with asbestos and outline the steps you and the schools in your district can take to identify asbestos-containing materials and to protect students and school personnel from exposure.

Also participating in this EPA program are the Department of Health, Education, and Welfare, and the Occupational Safety and Health Administration, and the Consumer Product Safety Commission. Through the Regional Offices located in major cities across the country, EPA and these Agencies will provide assistance for the difficulties that you may encounter in undertaking a control program in your schools. We are operating several toll-free numbers that you can call to ask for information and assistance. A videotape that was prepared to supplement this manual will also be available for your use.

A survey form is included in this manual. The form asks questions on the results of the control programs you conduct in your schools. Your participation in this part of the EPA program would be appreciated. By completing the form you will assist us in assessing the extent of the asbestos-containing material problem in the United States.

I encourage you and your staff to review the enclosed manuals and inform the schools in your district of the EPA program. A successful nationwide school asbestos program depends on your efforts and those

of school officials across the country. We look forward to working with you in the important weeks and months ahead.

Sincerely,
/s/ Steven D. Jellinek
Assistant Administrator for Toxic Substances

Table of Contents

Acknowledgements

Preface

Chapter 1: Introduction: The Concern 1

Chapter 2: Asbestos and Its Uses 2

Chapter 3: How to Conduct an Asbestos Control Program 5

Chapter 4: Inspecting for Friable Material 7

Chapter 5: Sampling Friable Material 9

Chapter 6: Analysis of Bulk Samples 11

Chapter 7: Exposure Assessment 13

Chapter 8: Corrective Action 15

Chapter 9: Specificiations and Requirements for Contractors 20

Chapter 10: EPA School Survey 26

Chapter 11: Assistance from Federal and State Agencies 33

Appendix A: U.S. Environmental Protection Agency Regulations for Asbestos 35

Appendix B: U.S. Environmental Protection Agency Regional National Emission Standards for Hazardous Air Pollutants (NESHAPS) Coordinators 44

Appendix C: U.S. Department of Labor-Occupational Safety and Health Administration (OSHA) Asbestos Regulations 45

Appendix D: State Occupational Safety and Health Program Offices and U.S. Department of Labor-Occupational Safety and Health Administration (OSHA) Field Locations 50

Appendix E: U.S. Department of Health, Education, and Welfare--National Institute of Occupational Safety and Health (NIOSH) Regional Offices 57

Appendix F: U.S. Department of Health, Education, and Welfare Regional Health Administrators 58

Appendix G: Toll-Free Information Numbers 58

Appendix H: "Mineral Characterization of Asbestos-Containing Spray Finishes" 59

## Chapter 5: Sampling Friable Material

The sampling and analysis of friable material are extremely important. The decision to take corrective action will depend, in large part, on the results of the laboratory analysis. It is critical, therefore, that sampling in schools is carried out properly and that laboratory analyses are performed accurately.

The sampling procedures outlined in this chapter should be followed closely. Improper sampling will result in unreliable analyses and lead to either unnecessary corrective action or to no action for potentially hazardous material.

The choice of the analytical technique and an analytical laboratory are also important. Chapter 6 contains information on analytical techniques and laboratory selection.

### Is sampling and analysis of friable material necessary?

Friable material should always be sampled and analyzed for asbestos. Neither visual inspection nor checking building records establish the presence of asbestos in friable material. Suspect material could contain glass fibers, cellulose, or other non-asbestos mineral fibers.

### How to take a sample

If friable material is found, a representative sample should be taken from within the material itself by penetrating the depth of the material with a sample container. It is important to penetrate the material because it may have been applied in more than one

layer or covered with paint or a protective coating. This kind of sample is called a *bulk sample.*

One sample should be taken for approximately every 5,000 square feet of material having the same color and texture (i.e., it is homogeneous in appearance). Material of a different appearance should be sampled separately.

Small classrooms, offices, or closets with less than 5,000 square feet of friable material should also be sampled separately if different material is found.

Sampling is not difficult and can be performed by school personnel if these procedures are followed:

(1) Use a small container such as a plastic 35mm film canister or a *small,* wide-mouthed glass jar with a screw-on lid. The container should be dry and clean.

(2) *Gently* twist the open end of the container into the material. A core of the material should fall into the container. A sample can also be taken by using a knife to cut out or scrape off a small piece of material and then placing it into the container.

Be sure to penetrate any paint or protective coating and all the layers of the material. If the sample container cannot penetrate the material, consider whether the material is really friable or not.

(3) Tightly close the sample container; wipe the exterior of the container with a damp cloth to remove any material which may have adhered to it during sampling.

(4) Tape the container lid to prevent the accidental opening of the container during shipment or handling.
(5) Label the sample container. This label should identify the school and date the sample was taken, and bear a unique identification (ID) number.
(6) Make a record of each sample by noting the date the sample was taken, location of material sampled, the area or room sampled, and the sample ID number.
(7) Send the sample to an analytical laboratory for analysis (See Chapter 6).

**What precautions should be taken during sampling?**

To avoid causing unnecessary exposure to asbestos fibers, the following precautions should be taken during sampling.

- The material should be sampled with the area is not in use.
- Only those persons needed for the sampling should be present.
- The sample container should be held away from the face during actual sampling.
- Do not disturb the material any more than necessary.
- The material can be sprayed with a light mist of water to prevent fiber release during sampling.
- If a large number of samples are taken, NIOSH recommends that the sampler wear an approved respirator. Contact the NIOSH

Regional Offices listed in Appendix E for information on approved respirators.

- If pieces of material break off during sampling, wet mop floors and areas where they have fallen.

**Should the air be sampled?**

Air sampling is the counting of fibers suspended in the air. A known volume of air is pumped through a filter where all suspended particles are collected. A standardized air sampling method with specific equipment and particle counting techniques is used by the Occupational Safety and Health Administration (OSHA) and industrial hygienists for evaluation of airborne asbestos contamination. Unfortunately air sampling by this standard method cannot show whether the friable material actually contains asbestos fibers. The method counts any particle of a certain size and fibrous shape. The fibers that are counted may or may not be asbestos.

Bulk sampling and analysis of the friable material itself is the only method to determine whether or not asbestos is present in the material.

Supreme Court, U.S.
FILED
OCT 10 2008
OFFICE OF THE CLERK

No. 08-319

In The

# Supreme Court of the United States

HARENDA ENTERPRISES, INC.,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J.B. VAN HOLLEN
Attorney General

*JEFFREY M. GABRYSIAK
Assistant Attorney General
Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9619
**Counsel of Record*

October 10, 2008

## QUESTIONS PRESENTED

Issue 1: Whether the language contained in a federal EPA administrative rule addressing the proper method for testing of multi-layered building materials for asbestos content, adopted by the State of Wisconsin (through incorporation by reference), is sufficiently unclear so as to justify reliance on EPA guidance documents in construing its terms?

Issue 2: Did the Supreme Court of Wisconsin violate Petitioner Harenda's substantive due process rights by affirming the trial court's factual finding that the State of Wisconsin's test results established a regulated amount of asbestos in layered plaster even though one of Harenda's sampling events resulted in negative test results.

Issue 3: Are EPA's regulations concerning the proper testing method for the analysis of layered building materials for asbestos content unconstitutionally vague?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

STATEMENT OF THE CASE ..... 1

ARGUMENT ..... 9

I. REVIEW OF WISCONSIN'S ASBESTOS RULE BY THIS COURT IS UNWARRANTED BECAUSE IT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION. ..... 9

II. THE "CONFLICT" IS NOT WORTHY OF REVIEW BY THIS COURT INSOFAR AS IT IS BETWEEN A SEVEN MEMBER STATE APPELLATE COURT OF LAST RESORT AND A SINGLE FEDERAL DISTRICT COURT JUDGE. ..... 10

III. THE ISSUE RAISED BY THE PETITIONER IS NOT A PROPER SUBJECT OF REVIEW BY THIS COURT INSOFAR AS THE CONFUSION CAUSED BY THE RULE AS WRITTEN COULD BE EASILY CORRECTED BY THE EPA PROMULGATING AN AMENDED RULE. ..... 11

IV. THE CONFLICT BETWEEN THE TWO COURT DECISIONS DOES NOT PRESENT A PROPER BASIS FOR THIS COURT TO GRANT REVIEW BECAUSE THE COURT'S DECISION IN *SAN DIEGO GAS* LACKS ANALYSIS AND EXPLANATION WHEREAS THE WISCONSIN SUPREME COURT'S DECISION IN *HARENDA* IS FULLY SUPPORTED BY LEGAL REASONING AND JUSTIFICATION ..... 13

V. THE WISCONSIN SUPREME COURT DID NOT HOLD THAT THE STATE'S POSITIVE TEST RESULTS WERE PRESUMPTIVELY VALID AND THAT HARENDA'S NEGATIVE TEST RESULTS WERE PRESUMPTIVELY INVALID; CONSEQUENTLY, HARENDA WAS NOT DENIED DUE PROCESS.....19

VI. HARENDA WAIVED ITS RIGHT TO ARGUE ITS CLAIM THAT IT WAS DENIED DUE PROCESS BY THE WISCONSIN SUPREME COURT'S DECISION INSOFAR AS IT CONFLICTS WITH THE REQUIREMENT THAT ONLY REPRESENTATIVE SAMPLES BE ANALYZED. .....21

CONCLUSION.....23

Oral Decision of Trial Court (excerpt).....1a

## TABLE OF AUTHORITIES

### CASES CITED

*Hormel v. Helvering,*
312 U.S. 552, 61 S. Ct. 719, 83 L. Ed. 1037 (1941) ..... 22

*Interest of A.L.W.,*
153 Wis. 2d 412, 451 N.W.2d 416 (1990)..... 23

*Singleton v. Wulff,*
428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) ..... 22

*State v. Harenda Enters., Inc.,*
2006 WI App 230, 297 Wis. 2d 571, 724 N.W.2d 434 ..... 8, 16

*State v. Harenda Enters., Inc.,*
2008 WI 16, 307 Wis. 2d 604, 746 N.W.2d 25 .....8, 12, 18, 19, 20, 21

*State v. Huebner,*
2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727 ..... 23

*U.S. v. American Nat. Can Co.,*
126 F. Supp. 2d 521, (N.D. Ill. 2000) ..... 20

*United States v. San Diego Gas & Electric* Company, et. al.,
____ F. Supp. ____.....10, 11, 13

## WISCONSIN RULES CITED

Wis. Admin. Code ch. NR 447 ..... 1, 4

Wis. Admin. Code § NR 447.02(1)(b) ..... 3

Wis. Admin. Code § NR 447.07(4)(k) ..... 1

Wis. Admin. Code § NR 447.08(1) ..... 1

Wis. Admin. Code § NR 447.08(6)(a) ..... 1, 4

Wis. Admin. Code § NR 447.08(6)(b) ..... 1, 4

Wis. Admin. Code § NR 447.13(1) ..... 1

## FEDERAL REGULATIONS CITED

40 CFR part 763 ..... 3

## OTHER AUTHORITIES CITED

"Clarification Regarding Analysis Of Multi-Layered Systems," Federal Register, Vol. 59, p. 542, January 5, 1994; Federal Register, Vol. 60, pp. 65243-44, December 19, 1995 ..... 12

## STATEMENT OF THE CASE

### Allegations in Complaint

By complaint filed July 30, 2003, in Milwaukee County Circuit Court, the State of Wisconsin ("state") alleged that defendant-appellant Harenda Enterprises, Inc., ("Harenda"), in its capacity as an "operator" of a demolition project, was liable for forfeitures, penalties, and surcharges for violating the following provisions of Wis. Admin. Code ch. NR 447:

a. Failure to adequately wet asbestos-containing material ("ACM") in violation of Wis. Admin. Code § NR 447.08(6)(a);

b. Failure to carefully lower ACM in violation of Wis. Admin. Code § NR 447.08(6)(b);

c. Failure to remove the ACM prior to demolition activity in violation of Wis. Admin. Code § NR 447.08(1);

d. Discharge of visible emissions to the outside air during the disturbance of ACM in violation of Wis. Admin. Code § NR 447.13(1); and

e. Failure to file an accurate notice of intent to renovate a facility containing ACM in violation of Wis. Admin. Code § NR 447.07(4)(k).

R. 4:5-13.

The complaint alleged that Harenda was hired by the Wisconsin Center District, the owner of the old Milwaukee Auditorium, to provide asbestos abatement consulting services for the auditorium renovation project, including the proper sampling and testing of all suspected ACM, the filing of appropriate governmental notices and documents, general asbestos abatement planning, oversight of abatement contractor activity, and air monitoring duties. The complaint further alleged that asbestos-containing plaster was improperly removed during renovation in violation of the above-cited administrative code provisions. The complaint also alleged that Harenda's failure to identify the plaster as material containing a sufficient amount of asbestos so as to render it subject to administrative rules requiring the taking of safety precautions during abatement precipitated the violations. R. 4:5-9.

## Facts Established Before the Trial Court

The trial court found that sometime prior to June 2001, the Wisconsin Center District decided to renovate a facility it owned located at 500-510 West Kilbourn Avenue in the City of Milwaukee, State of Wisconsin, that was originally constructed in 1904 and was known as the Milwaukee Auditorium. R. 71:2; Pet.-App. A-212 to A-213.

In June 2001, the Wisconsin Center District retained Harenda to conduct an inspection of the auditorium for possible ACM prior to the anticipated renovation. Harenda then undertook an inspection of the auditorium in June 2001 and in January 2002 to determine whether the facility contained ACM, and if so, the amount of the ACM. R. 71:2; Pet.-App. A-213.

ACM falls within the regulations governing proper removal methods to prevent or minimize the release of asbestos fibers into the air if suspected ACM contains "more than 1% asbestos as determined using the method specified in Appendix E to Subpart E, 40 CFR part 763, section 1." Wis. Admin. Code § NR 447.02(1)(b).

Harenda's pre-demolition inspection identified the existence of large quantities of ACM exceeding the 1% limit within the old Milwaukee Auditorium structure. R. 71:2-3; Pet.-App. A-213.

Harenda's January 2001 pre-demolition inspection included taking samples of plaster material from walls of an area of the auditorium referred to as the "second floor bowl area." Pet.-App. A-213. The laboratory test results Harenda received from its contracted testing lab concerning the plaster in the second floor bowl area indicated that none of the samples contained greater than 1% asbestos under the method that the testing laboratory used. R. 71:3; Pet.-App. A-214.

The next slate of testing occurred just prior to or during the demolition of plaster on the walls of the second story bowl area. On March 21, 2002, an inspector for the City of Milwaukee, Department of Neighborhood Services obtained a number of samples of layered plaster from the Milwaukee Auditorium for purposes of having the samples tested for asbestos content. One was a sample of multi-layered plaster from the second story bowl area of the Milwaukee Auditorium. Results of laboratory analysis (using the "polarized light microscopy" test or "PLM") of that revealed that one of the layers contained 2% asbestos. Subsequent analysis of the same sample using the more accurate "point counting" method revealed that the subject layer contained 1.75% asbestos. R. 47:276, 287; 71:3; Pet.-App. A-214 to A-215.

On the basis of the point counted test result, plaster demolition on the project was halted on April 2, 2002, because such plaster was being removed without the safety measures required by Wis. Admin. Code ch. NR 447.[1] The area where the asbestos-containing plaster was removed was extremely dusty due to near dry removal. Very little of the asbestos-containing plaster remained intact. Most had been demolished and was laying in piles in the interior of the bowl area. R. 47:276.

---

[1] Such safety regulations require that ACM be carefully lowered during removal and that the material be wetted prior to removal in order to limit dust emissions into the air. Wis. Admin. Code § NR 447.08(6)(a) and (b).

Also on April 2, 2002, the same inspector for the City of Milwaukee, Department of Neighborhood Services assisted in the taking of three more samples of plaster from the second story bowl area of the old Milwaukee Auditorium. Test results (using the point counting method) for these three samples revealed that all three samples contained more than 1% asbestos. The samples contained asbestos in the following amounts: 2%, 1.25%, and 2.5%. R. 47:276-277, 287; 71:4; Pet.-App. A-215.

On April 4, 2002, representatives from the Wisconsin Department of Natural Resources ("DNR") took samples of the plaster from the second story bowl area of the old Milwaukee Auditorium. Ten samples were obtained. After the ten samples were obtained, each of the individual samples was "split" into two parts. The DNR retained ten of the split samples, and the other ten split samples were given to Harenda. R. 36:2-4. Scientific analysis of the samples retained by the DNR revealed that four of the ten samples contained more than the minimum 1% asbestos to render the sample regulated asbestos-containing material (RACM). R. 37:2, 3-7; 38:2, 3-9; 71:4-5; Pet.-App. A-216 to A-217.

Harenda also had its ten split samples independently tested. Although its chosen lab (a different lab than the one that did the initial testing and which found no regulated asbestos) did not perform an analysis using methods as accurate as those used by the State Laboratory of Hygiene or the City of Milwaukee (they did not "point count" the samples), Harenda's own lab found that five of the ten split

samples contained more than 1% asbestos. R. 35 3-24; 71:5; Pet.-App. A-217 to A-218.

Test results exceeding 1% asbestos content (from the State Laboratory of Hygiene and from the lab that tested Harenda's "split" samples) were all based on results from individual layers from multi-layered samples. R. 71:4-5; Pet.-App. A-216 to A-218.

## Trial Court's Ruling

The parties each sought judgment in their favor by filing cross-motions for summary judgment. The court denied those motions. R. 66:2. The trial court deferred determination of a purely legal issue raised by the cross-motions for summary judgment, the issue of whether EPA published "clarifications" or guidance documents would be used in interpreting the EPA rule governing the proper methodology to be used in testing multilayered samples for asbestos content. R. 66:3; 78: 17-26. During a hearing held on April 25, 2005, the trial court ruled that the EPA administrative rule on testing multi-layered samples would be construed through use of the clarifications because the EPA rule was vaguely worded. R. 78:25-26; Resp.-App. 5a-6a. In so ruling, the court determined that when any single layer of a multi-layer material contains an amount of asbestos exceeding 1%, the material is subject to the asbestos abatement safety regulations set forth in the administrative rules and must be abated in compliance with those rules. R. 78:17-26; Resp.-App.

1a-8a. A copy of the trial court's determination is attached at Resp.-App. 1a-8a.

## Trial Court's Resolution

Following the trial court's April 25, 2005, ruling, the parties recognized that the case hinged on the trial court's interpretation of the Wisconsin administrative rule describing the testing methodology to be used in testing multi-layered building material for the presence of asbestos. Consequently, the parties jointly submitted to the court for its approval proposed findings of facts and conclusions of law that were ultimately entered by the court. R. 71:1-11; Pet.-App. A-211to A-225. Based on the jointly agreed upon facts and the court's determination that the administrative rule governing the testing of multi-layered materials should be interpreted in light of the EPA clarifications, the trial court granted summary judgment in favor of the state. R. 72:2-3; Pet.-App. A-227 to A-229.

## Wisconsin Court of Appeals' Ruling

The Wisconsin Court of Appeals reversed the trial court's determination that the EPA rule regarding the testing of multi-layered materials for asbestos content should be interpreted through the clarifications. The court of appeals concluded that because the language of the rule was clear, the EPA clarifications regarding the rule should be ignored. The court of appeals held that the rule required that

the asbestos content of each layer of a multi-layered material be combined or averaged to yield an estimate of asbestos content of the whole sample. The court further ruled that it was only when this combined or averaged amount exceeded 1% asbestos did safety regulations apply to removal of the material. *State v. Harenda Enters., Inc.*, 2006 WI App 230, ¶¶ 1-9, 297 Wis. 2d 571, 724 N.W.2d 434; Pet.-App. A-58 to A-69.

**Wisconsin Supreme Court's Ruling**

In a 4 to 3 decision, the Wisconsin Supreme Court determined that the language of EPA's rule governing the testing of multi-layer building materials for asbestos was ambiguous. The court further determined that it should give deference to EPA's own interpretation of its own rule insofar as its interpretation was neither inconsistent with the rule nor was it clearly erroneous. The court also concluded that the EPA's clarifications did not constitute impermissible rule making. Finally, the court determined that the circuit court's judgment did not violate Harenda's substantive due process rights. *State v. Harenda Enters., Inc.*, 2008 WI 16, ¶ 4, 307 Wis. 2d 604, 746 N.W.2d 25; Pet.-App. A-3 to A-4.

## ARGUMENT

REASONS FOR DENYING THE PETITION:

I. REVIEW OF WISCONSIN'S ASBESTOS RULE BY THIS COURT IS UNWARRANTED BECAUSE IT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

This case involves a state supreme court's interpretation of a state administrative rule, and thus presents no federal question for this Court to resolve. The Wisconsin Supreme Court applied state law to review a trial court's determination concerning whether a state administrative rule is ambiguous and in need of further interpretation and/or clarification. While the state administrative rules involved in this case are based on a near identical federal set of administrative rules, the Wisconsin Supreme Court applied Wisconsin law to evaluate the clarity of a Wisconsin administrative rule being enforced in this case. The Wisconsin Supreme Court's decision and holding are exclusively a matter of state law, only having precedential effect in the State of Wisconsin, and then only in Wisconsin courts. The Wisconsin Supreme Court's decision in this case has no precedential effect for federal courts. The decision of the Wisconsin Supreme Court in this case has no bearing on the validity or interpretation of the identical language found in the federal rules as applied by the federal government. Because no federal issue is involved in this case, Harenda's Petition for Certiorari should be denied.

## II. THE "CONFLICT" IS NOT WORTHY OF REVIEW BY THIS COURT INSOFAR AS IT IS BETWEEN A SEVEN MEMBER STATE APPELLATE COURT OF LAST RESORT AND A SINGLE FEDERAL DISTRICT COURT JUDGE.

Harenda argues that this Court should accept review of this case because there are conflicting court decisions on the issue presented and the conflict should be resolved by this Court. Harenda claims a conflict between the Wisconsin Supreme Court's decision in this case with Judge Dana M. Sabraw's decision in *United States v. San Diego Gas & Electric Company, et. al.*, ____ F. Supp. ____, *Slip Op.* at 1-17 (S.D. Cal. 2006); P-Ap. 131-146. Of significance, however, is the fact that the supposed conflict is between the seven member Wisconsin Supreme Court and a single federal court district judge in the Southern District of California. No other state courts of last resort or federal appellate courts (or for that matter, federal district courts) have addressed this issue. This Court should deny the petition for certiorari because the question presented is not "ripe" for this Court's consideration. Only true conflicts that arise between multi-judge courts of last resort should be the subject of resolution by this busy Court. Any resolution of the conflict between the Wisconsin Supreme Court and this single Federal District Court judge should be addressed first by other lower appellate forums. Ultimately, the conflict is likely to

be resolved by those lower courts, rendering review by this Court unnecessary.

Harenda properly points out in its brief that the *San Diego Gas & Electric* case is now pending on appeal before the Circuit Court of Appeals for the Ninth Judicial Circuit. Harenda's Petition at 15, footnote 2. However, the issue regarding the proper method to be used in evaluating multi-layered samples for the presence of asbestos, whether it be the evaluation of single layers or an averaging of the layers, is *not* before that court. It was not included by the Appellant Unites States of America in its brief filed with that Court. The State has "Proposed for Lodging" a copy of the Appellant United States of America's brief for the Court's consideration pursuant to Rule 32.3.

## III. THE ISSUE RAISED BY THE PETITIONER IS NOT A PROPER SUBJECT OF REVIEW BY THIS COURT INSOFAR AS THE CONFUSION CAUSED BY THE RULE AS WRITTEN COULD BE EASILY CORRECTED BY THE EPA PROMULGATING AN AMENDED RULE.

It goes without saying that this Court should only accept for review cases that present controversies that only this Court can remedy. That is not the situation in regard to the issue Harenda is asking this Court to review.

The Wisconsin Supreme Court used EPA's clarifications to construe the meaning of the rule addressing the proper method for measuring the percentage of asbestos in multi-layer construction materials only after finding the rule ambiguous as written. *Harenda*, 307 Wis. 2d 604, ¶ 36; Pet.-App. A-18. The solution to the confusion caused by the EPA rule as written is the amendment of the rule, not review by this Court. Indeed, even if this Court would accept this case for review and subsequently rule in favor of Harenda's interpretation of the rule as written, the Court's decision's precedential effect could be quickly cut short by EPA amending its rule in conformity with its published clarification/guidance documents. *See*, "Clarification Regarding Analysis Of Multi-Layered Systems," Federal Register, Vol. 59, p. 542, January 5, 1994; Federal Register, Vol. 60, pp. 65243-44, December 19, 1995; Pet.-App. A-159 to A-165. This Court's time and efforts would best be utilized by giving it to cases that can only be resolved by this Court rather than devoting it to issues that could best be resolved by technical experts within the EPA amending its admittedly ambiguous rule.

## IV. THE CONFLICT BETWEEN THE TWO COURT DECISIONS DOES NOT PRESENT A PROPER BASIS FOR THIS COURT TO GRANT REVIEW BECAUSE THE COURT'S DECISION IN *SAN DIEGO GAS* LACKS ANALYSIS AND EXPLANATION WHEREAS THE WISCONSIN SUPREME COURT'S DECISION IN *HARENDA* IS FULLY SUPPORTED BY LEGAL REASONING AND JUSTIFICATION.

The United States Supreme Court should only grant review in "conflict of decisions" cases in instances where the issues involved have been fully litigated or "vented" in the lower courts. That is not the case here.

When the District Court for the Southern District of California issued its decision in *United States v. San Diego Gas & Electric Company, et. al.*, ____ F. Supp. ____, *Slip Op.* at 1-17 (S.D. Cal. 2006); Pet.-App. A-167 to A-195, it offered virtually no rationale or analysis regarding why it believed the language of EPA's rule regarding the testing of multi-layered materials was clear on its face. In *San Diego Gas*, the court jumped to the conclusion that the interim method described an "averaging test method" verses the "single layer method" described in the clarifications. Pet.-App. A-178 to A-180. The court never addressed the question of whether the language of the interim method was unclear. The court simply

concluded that insofar as the averaging test method (the interim method) was promulgated as a rule and since the single layer method (the clarifications) was not, that the averaging method controlled. Pet.-App. A-180 to A-186. The court did not address whether there was ambiguity regarding the term "combined" or the fact that the rule does not define the meaning of that term. The court never considered the fact that the term "average" never appears in the text of the rule. No rules of statutory construction were considered. The court did not address ambiguity regarding whether one used individual layer results or a combined result for comparison under the 1% asbestos content limit. The court did not address any safety concerns with interpreting the rule in such a manner to allow for a fictitious dilution of high concentrations of asbestos in individual layers.

In contrast, the Wisconsin Supreme Court painstakingly analyzed the language of the rule before finding the rule ambiguous and relying on the clarifications in construing its terms. The court wrote:

> ¶ 30 The focus of our inquiry is on the last sentence of the above rule. It describes two different types of testing measurements: (1) a quantification of asbestos fibers in each discrete layer, and (2) an "estimate of asbestos content for the whole sample" achieved by combining the results from discrete layers. However, it is unclear which of these measurements is relevant in determining whether material is ACM.

¶ 31 The circuit court aptly describes the ambiguity in the two main clauses of the sentence, noting that they say different things:

> [I]f they can discern discrete strata, they're supposed to come up with a number for each layer. It says that in the first clause of the final sentence that I read. And then it's got a conjunction - and - which supports [Harenda's] argument, and the second clause, which says, And then you composite or come up with a total for all the layers. And the question what does it mean?... I'm going to borrow from my early life as an English teacher. There's two clauses in one sentence, and they say two different things. They don't rule each other out, either. They say two different things, and they're joined by a linking conjunction....
>
> [I]t doesn't say whether the violation occurs in both parts of the sentence, just one, or the other. It is not

> clear. However, I think it's significant that each half of the sentence doesn't rule the other out. And so then the question becomes, is this interim method rule ... clear? No, it's not clear. And that's pretty obvious.

¶ 32 The second clause of the sentence reveals further ambiguity with respect to how to arrive at an "estimate of asbestos content for the whole sample." It directs that "and then the results of each layer are combined." However, it is unclear what is meant here by the word "combined." The State asserts that it is ambiguous, but posits that a reasonable interpretation is that the results are added together. Harenda maintains that "combined" means that the results are averaged.

¶ 33 The court of appeals, without explanation, concluded that "combining" the results from each layer requires that the percentage of asbestos for each layer be averaged. Harenda Enterprises, 297 Wis. 2d 571, ¶ 4. An obvious problem with the court of appeals' and Harenda's "plain meaning" interpretation is that the word "average" cannot be found in the text of the rule.

¶ 34 Moreover, "combine" means to "bring into a state of unity; merge." American Heritage Dictionary of the English Language, 377 (3rd ed. 1992). "Average" is defined as the "arithmetic mean." Id. at 127. However, "arithmetic mean" refers to the "value obtained by dividing the sum of a set of quantities by the number of quantities in the set." Id. at 99. Thus, averaging requires combining quantities and then dividing. The language of the rule, however, states only that quantities are to be combined.

¶ 35 Further, the language of the section leaves unclear which layers are combined to yield an estimate of the asbestos content of the whole sample. There are two plausible interpretations. The first is that only the results from each layer in which there are asbestos fibers are combined to yield an estimate of the asbestos content of the whole sample. The second interpretation is that the results from every layer identified, including those in which no asbestos fibers are identified and quantified, are combined to yield the estimate of asbestos content for the whole sample. This appears to be the interpretation embraced by the court of appeals.

¶ 36 In light of these interpretations, we reject Harenda's contention that the

> text of the rule is unambiguous. It is unclear how the first clause of the relevant sentence relates to the second clause. Likewise, the meaning of the word "combine" is uncertain, and there are competing interpretations as to what layers are to be combined to yield an estimate of asbestos content. We therefore determine that the language of § 1.7.2.1 is ambiguous.

*Harenda*, 307 Wis. 2d 604, ¶¶ 30-36; Pet.-App. A-14 to A-18.

The Wisconsin Supreme Court's opinion is fully supported by legal reasoning and rationale, while the decision of the District Court for the Southern District of California is virtually void of such analysis. This Court should decline review of this issue until such time that more than one appellate court has fully analyzed the issue and the Supreme Court is presented with a petition for certiorari on the basis of two diametrically opposed appellate court decisions whose positions are supported by concrete legal reasoning.

## V. THE WISCONSIN SUPREME COURT DID NOT HOLD THAT THE STATE'S POSITIVE TEST RESULTS WERE PRESUMPTIVELY VALID AND THAT HARENDA'S NEGATIVE TEST RESULTS WERE PRESUMPTIVELY INVALID; CONSEQUENTLY, HARENDA WAS NOT DENIED DUE PROCESS.

Harenda argues that this Court should accept review of this case because the Wisconsin Supreme Court denied it substantive due process by holding that "when the defendant's test results are negative for ACM and the government's results are positive for ACM, there is an irrebuttable presumption that the government's results are valid, and the defendant's results are not valid." Petition For Certiorari at 31.

The Wisconsin Supreme Court did not so hold. Therefore, Harenda was not denied due process and further review on this ground would be inappropriate.

In the portion of its opinion addressing Harenda's due process arguments, the Wisconsin Supreme Court merely held that based upon the agreed to and stipulated facts that the trial court had before it, the trial court did not abuse its discretion or act arbitrarily in concluding that the test results *in this case* showed that the plaster material from the disputed area contained asbestos. *Harenda*, 307 Wis. 2d 604, ¶ 76; Pet.-App. A-38.

In addressing Harenda's due process claim, the Wisconsin Supreme Court began by reviewing the elements of a violation as set forth in *U.S. v. American Nat. Can Co.*, 126 F. Supp. 2d 521, 523 (N.D. Ill. 2000). *Harenda*, 307 Wis. 2d 604, ¶ 68; Pet.-App. A-34. The Court then noted that under controlling case law, the violations that the state alleged were strict liability violations and thus the state did not have to prove negligence or intent to violate the law. *Harenda*, 307 Wis. 2d 604, ¶ 69; Pet.-App. A-34 to A35. The Court then went on to properly note that there is no requirement that the state prove some sort of defect in the owner's or operator's sampling or testing, and that liability hinged on whether the plaster material contained more than one percent asbestos. *Harenda*, 307 Wis. 2d 604, ¶¶ 71-72; Pet.-App. A-36.

The Wisconsin Supreme Court then discussed the nature of the test results the trial court had before it when it reached its conclusion that plaster was disturbed in the disputed area that contained levels of asbestos greater than one percent. The Court further noted that these were test results which were the subject of stipulation by the parties and that the parties had agreed that they were accurate within their testing method. *Harenda*, 307 Wis. 2d 604, ¶ 75; Pet.-App. A-37.

Based on the above, the Wisconsin Supreme Court rightly concluded that the test results submitted in the case were sufficient to show the presence of asbestos in the disputed area and were sufficient to show that "there was nothing arbitrary in

the circuit court's conclusion that the tests showed that the material from the disputed area was ACM." *Harenda*, 307 Wis. 2d 604, ¶¶ 75-76; Pet.-App. A-37 to A-38.

.

At no time did the Wisconsin Supreme Court hold or even suggest that that there was a presumption that government tests were valid and controlling over a defendant's test results.

## VI. HARENDA WAIVED ITS RIGHT TO ARGUE ITS CLAIM THAT IT WAS DENIED DUE PROCESS BY THE WISCONSIN SUPREME COURT'S DECISION INSOFAR AS IT CONFLICTS WITH THE REQUIREMENT THAT ONLY REPRESENTATIVE SAMPLES BE ANALYZED.

Harenda argues it was denied due process by the Wisconsin Supreme Court's reliance on the EPA's clarification in interpreting its rules. Harenda contends that reliance on the clarifications was improper because allegedly EPA's clarification documents conflict with EPA's rules regarding the sampling of multilayered materials. Harenda contends that based on this conflict the Court should not have used the clarifications to address the ambiguity. This conflict, Harenda contends, provides a basis for this Court to accept its case for review.

What Harenda does not tell this Court, however, is that Harenda did not make this argument until it moved the Wisconsin Supreme Court for reconsideration of its decision. That motion was denied without opinion. Pet.-App. A-71 to A-72.

Nothing stopped Harenda from making this argument to the Wisconsin Supreme Court before the issuance of the Court's decision. As early as the time that Harenda responded to the state's Motion for Summary Judgment filed with the trial court, Harenda cited in its responsive brief federal regulations which require the sampling of all layers of a given multi-layer material when that can be accomplished. R. 42: 17-20. Yet, Harenda did not argue that the clarifications conflicted with the rules regarding sampling before the trial court. Nor did it make the argument before the Court of Appeals. Harenda also failed to make the argument when it argued the issue of whether the clarifications should be used in construing the EPA's rule when the issue was placed before the Wisconsin Supreme Court. It was only after the case was decided by the Wisconsin Supreme Court, that Harenda for the first time wanted the Wisconsin Supreme Court to consider its new argument by including it in its Motion to Reconsider. The argument could have been raised earlier. It was not. The Wisconsin courts did not overlook this issue, Harenda failed to raise it. Harenda's failure should not form the basis for this Court granting Harenda its requested relief. It is a general and well settled rule that federal appellate courts do not consider issues not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v.*

*Helvering*, 312 U.S. 552, 556 (1941). The same rule holds true in Wisconsin appellate courts. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727; *In Interest of A.L.W.*, 153 Wis. 2d 412, 416, n. 2, 451 N.W.2d 416 (1990).

## CONCLUSION

For the reasons set forth above, the state respectfully asks this Court to deny Harenda's Petition For Certiorari.

Dated at Madison, Wisconsin this 10th day of October, 2008.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

*JEFFREY M. GABRYSIAK
Assistant Attorney General

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9619

**Counsel of Record*

# APPENDIX

THE COURT: All right. There is going to be a trial to the Court. We've got the trial scheduled. The two motions today are from the defense. They're in the nature of motions in limine. And I'm going to be the trier of fact in this case, so it's a motion to exclude from evidence some things that will matter for the record for appellate purposes although, of course, I'm going to be aware of all these things because I've read these motions. But -- whatever.

With regard to the primary motion today, it raises a very good issue, and, you know, there were chunks of my career spent in the criminal division, and there are parts of this that are a due process kind of argument that I completely understand from the defense standpoint. This question boils down to whether the clarifications are, in effect, changes in the interim method as it was originally published in 1982. The interim method is apparently lengthy, but the portion of it that is included in the State's brief is what I will read into the record as the basis of my finding of what the interim method rule says, and it exists at Appendix E, Subpart E, 40, CFR, part 763, Section 1, Polarized Light Microscopy, and Section 1.7.2.1 reads -- and I'm going to read this whole paragraph into the record -- Bulk samples of building materials taken for the identification and quantitation of asbestos are first examined for homogeneity at low magnification with the aid of a -- and I'll spell this --
S-T-E-R-E-O-M-I-C-R-O-S-C-O-P-E. The core sample may be examined in its container or carefully removed from the container onto a glassine transfer paper or clean glass plate. If possible, note is made of the top

and bottom orientation. When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, and then the results for each layer are combined to yield an estimate of asbestos content for the whole sample.

Now, I'm going to interpret this rule, or the interim method, as it is referred to, as saying two things. What it says, in my summary form, is it says you take a chunk of wall, and you can take a core sample, which I interpret to mean multi layers. You just take a chunk of the wall, and from the core sample the chemist or the lab technician is to note the top and bottom orientation, and then if they can discern discrete strata, they're supposed to come up with a number for each layer. It says that in the first clause of the final sentence that I read. And then it's got a conjunction -- and -- which supports Mr. Rattan's argument, and the second clause, which says, And then you composite or come up with a total for all the layers. And the question is what does it mean? It first said you take a read for each layer, and in the second half of that same darn sentence it says, And then you come up with a number for the whole. I'm going to borrow from my early life as an English teacher. There's two clauses in one sentence, and they say two different things. They don't rule each other out, either. They say two different things, and they're joined by a linking conjunction.

What this doesn't say, and since Mr. Rattan didn't give me anything that says it either, I presume it doesn't exist, it doesn't say whether the violation

occurs in both parts of the sentence, just one, or the other. It is not clear. However, I think it's significant that each half of the sentence doesn't rule the other out. And so then the question becomes, is this interim method rule from 1982 clear? No, it's not clear. And that's pretty obvious.

So then what do you do with these clarifications? Now, the January clarification, January of 1994, the EPA comes out with clarification of the interim method that says, in significant part, in general, when a sample consists of two or more distinct layers, or materials, each layer should be treated separately and the results reported by layer (discrete strata).

So then the case law cited by Mr. Rattan would have me analyze whether this particular clarification from January '94 is inconsistent with the first or second clause of the sentence in the interim method. And it is not inconsistent with the first clause. It says the same thing the first clause says. But it adds the reporting. It says the results reported by layer. That isn't inconsistent with the first clause because the first clause says nothing about reporting.

Then the question is, is the January '94 clarification inconsistent with the second clause? I find that it is not inconsistent with the second clause because the second clause addresses a different thing. It addresses a combining of layers, and then the results for each layer are combined to yield an estimate of asbestos. So it's not inconsistent with the

second clause of the interim method, it just addresses something different.

As to the second clarification from December of 1995 -- I'm sorry, I got the wrong date -- the second -- no, that's right -- December of '95 -- it says, in the significant portion, quote, This clarification basically stated that all multi-layered systems -- it's referring now to the January '94 clarification -- back to the quote, except for wall systems where joint compound was used only at the joints and nail holes, must be analyzed as separate materials, and the results were not allowed to be combined to determine average asbestos content continuing the policy that dilution of an asbestos-containing material is not allowed.

So, construing this sentence of the second clarification, I asked myself whether it's inconsistent with the interim method, and it is not inconsistent with the first clause of the key sentence of the interim method. The question is whether it is inconsistent with the second clause, and it -- I'm going to find today that it's not inconsistent. And the reason I find that it's not is that it is addressing something not addressed in that sentence from the interim method. It is distinguishing a kind of wall that you would not do a layer analysis on, that is, where the joint compound was used only at the joints and nail holes, and it says you must analyze the separate materials of other walls, and you can't combine.

Now, the question is whether that language -- and it's a fair argument that Mr. Rattan raises -- whether that language is inconsistent with the second

clause of the interim method. And I don't think it is because elsewhere in that December '95 EPA clarification they talk about the things that Mr. Gabrysiak argued here today. They supplied the thinking of the EPA at the time in 1982 that the interim method was passed, the thinking being that here -- and this gets into intent of the drafters -- that the lack of clarity of the original '82 rule is due to the fact that the drafters were imagining two different kinds of walls, two different kinds of sampling system -- one where discrete layers could be analyzed, one where they weren't analyzed -- and they're supplying in December of '95 the background that, hey, testers often want to save money and just do a core sample, a lump analysis, and if there isn't -- or, strike that -- if there is asbestos determined in that cheaper, faster method, well, then, you're going to have to do it anyway. If there isn't, you go back and do layers.

Now, admittedly, that rationale is not elucidated in the 1982 interim method. It isn't spelled out in there. And so I'm finding that the clarification from December of '95 is not inconsistent with the '82 rule, but I am doing that based on this Court's analysis of the intent of the drafters as well as the language of the interim method and the clarifications. I think that the proper law for the Court to follow here today is where there is a lack of clarity in the interim method, which I have found there was in this case, then the Court is to look at the language of the rule, construe it like I would a statute, look for the intent of the drafter, and in this case I am to favor a construction that would honor the drafter's intent over a construction that would defeat their intent.

These are regular rules of construction that I follow on a regular basis although I'm not usually construing rules, but, rather, statutes. And it appears to me that the drafter's intent was to come up with a method of analyzing asbestos in layered walls as well as a core sample, and that the intent of the drafters was to protect the public from a harmful substance. And viewing the language in these rules -- this rule and these clarifications -- I find that the intent is best filled by construing the clarifications in this case as clarifications.

So I'm doing two things to try to be clear for the appellate record here -- I am looking at the language of the statutes and saying that neither clarification is inconsistent with the interim method, and that the construction that I'm putting on the interim method is consistent with the drafter's intent, which I am obligated to look for and follow. I'm also -- and this is a big one here -- giving deference to the agency's own interpretation as expressed in the clarifications, the language from the December '95 clarification that I've already talked about, the fact that the labs -- EPA labs and the NVLAP labs -- follow these clarifications. These are the agencies that deal with this on a regular basis, and to the extent these are EPA labs and EPA clarifications, it is the very agency that's involved in the rule in the first place, and their own interpretation is a matter that I give deference to, and they believe this to be a clarification as is expressed in the plain language and not a change in the original rule. So I am giving deference to it, and that's part of the Court's ruling here today.

I also agree with that argument of the State that the construction of the rule as not inconsistent with the interim method enabled me to not render absurd the clarification. If they were to allow a combining of multi layers, including layers that are not of the same type, such as the example given by the State, styrofoam and plaster, that would be absurd and ridiculous. The interim method couldn't have meant that. And this clarification, especially the December '95 one, explains that in a way that is consistent with the agency's intent.

Finally, I would note that while I'm, apparently, the only reported circuit court or trial -- or appellate Court that has dealt with this issue, the State has cited an administrative decision that came up with the same conclusion. Granted, it's just an administrative decision, I'm not bound to follow it, and the defense has made the previous argument that that is an unpublished decision because by its nature administrative decisions are and can't be cited. I don't believe that that is a proper statement of the law. Administrative decisions can be cited to the Court and not be a violation of our ethical rules, and it does give me some guidance in this matter, and I have considered it for this decision today.

So, in sum, I'm finding that the clarifications are not legislative rules. I agree with the defense that if they were, they would require that -- or it would be required that the EPA follow the legislative rule-making process. It is admitted that that has not been filed in this case. So, if a subsequent review by the Court of Appeals finds I am wrong in that earlier

conclusion, it is clear, and I think the State concedes, that the rule making has not been followed in this particular case.

I would also note an argument was made by the defense that the clarifications are unenforceable for vagueness. I am specifically not finding them vague. I don't think there's anything in the interim method as spelled out in the '82 rule that's vague. It just says two different things and doesn't say which one you should report in the event you have an inconsistency between the two methods -- i.e. the layered method, where one of the layers or more is over the limit, or the combining of the whole. And so I reject that unenforceable for vagueness argument.

109

(3)

Case No. 08-319

Supreme Court, U.S.
FILED
OCT 21 2008
OFFICE OF THE CLERK

# In the Supreme Court of the United States

HARENDA ENTERPRISES, INC.,

*Petitioner,*

v.

STATE OF WISCONSIN,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MARK W. RATTAN
*Counsel of Record*
LITCHFIELD CAVO, LLP
13400 BISHOPS LANE, SUITE 290
BROOKFIELD, WI 53005
(262) 784-8966
ATTORNEY FOR PETITIONER

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

## TABLE OF CONTENTS


| SECTION TITLE | | Page No. |
|---|---|---|
| TABLE OF CONTENTS ..... | | i |
| TABLE OF CITED AUTHORITIES ..... | | iii |
| ARGUMENT ..... | | 1 |
| I. | THE WISCONSIN SUPREME COURT CONSTRUED FEDERAL REGULATIONS WITH NATIONAL APPLICATION..... | 1 |
| II. | THE TESTING PROTOCOL ISSUE IS A PART AND PARCEL OF THE *SAN DIEGO GAS* APPEAL .... ..... | 4 |
| III. | THE ARGUMENT THAT THIS COURT SHOULD DECLINE TO HEAR THE CASE BECAUSE THE EPA CAN CORRECT ITS OWN RULE WOULD ALLOW AGENCIES TO RUN ROUGHSHOD OVER THE DEMOCRATIC PROCESS. ..... | 6 |
| IV. | ARGUMENT RESPECTING THE SUBSTANCE OF THE REGULATORY INTERPRETATION ISSUE IS PREMATURE ..... | 8 |

| SECTION TITLE | | Page No. |
|---|---|---|
| V. | ARGUMENT RESPECTING THE SUBSTANCE OF THE DUE PROCESS ISSUE IS PREMATURE..... | 9 |
| VI. | HEI DID NOT WAIVE THE ARGUMENT CONCERNING REPRESENTATIVE SAMPLING .... | 10 |
| CONCLUSION ..... | | 12 |

## TABLE OF CITED AUTHORITIES


| Cited Authority | Page No. |
|---|---|
| **Cases** | |
| *Boynton v. Commonwealth of Virginia*, 264 U.S. 454, 81 S.Ct. 182, 5 L.Ed.2d 206 (1960) | 12 |
| *Deeds v. United States*, 306 F.Supp. 348 (D. Mont. 1969) | 3 |
| *Hoosier Casualty Company of Indianapolis, Ind. v. Fox*, 102 F.Supp. 214 (N.D. Iowa 1952) | 3 |
| *Lear, Incorporated v. Adkins*, 395 U.S. 653, 89 S.Ct. 1902, 23 L.Ed.2d 610 (U.S. 1969) | 11 |
| *MCI Telecommunications Corporation v. American Telephone and Telegraph Company*, 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) | 7, 8 |
| *Motor Vehicle Manufacturers Association of the United States, Incorporated v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) | 8 |
| *In re Nolan*, 383 B.R. 391 (6th Cir. 2008) | 3 |

| Cited Authority | Page No. |
|---|---|
| *United States v. Great Northern Railway Company,* 343 U.S. 562, 72 S.Ct. 985, 96 L.Ed. 1142 (1952) ..... | 12 |
| *Verizon Communications Incorporated v. Federal Communications Commission,* 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) ..... | 7 |
| *Yee v. City of Escondido, California,* 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) ..... | 11, 12 |
| **Statutes** | |
| Administrative Procedure Act, 5 U.S.C. §553 [Appx., Doc. 8] ..... | 3 |
| **Regulations** | |
| Asbestos-Containing Materials in School Buildings: A Guidance Document ("Reference 5") [Appx., Doc. 23] ..... | 10 |
| Interim Method of the Determination of Asbestos in Bulk Insulation Samples, appendix E, subpart E, 40 CFR part 763, section 1.7.2.1. [Appx., Doc. 6] ..... | 2-7, 10, 11 |
| National Emission Standards For Hazardous Air Pollutants (NESHAP), 40 CFR §61.140, *et. seq.* [Appx., Doc. 5] ..... | 1, 2, 5, 7, 10 |

| Cited Authority | Page No. |
|---|---|
| NR 447.02-.08; NR 447.13, Wisconsin Administrative Code [Appx., Doc. 10] | 1, 2 |
| NR 484.04(28), Wisconsin Administrative Code [Appx., Doc. 9] | 2 |
| **U.S. Supreme Court Rules** | |
| Rule 10 | 7, 8, 9 |
| Rule 32.3 | 4 |
| **Other - EPA Publications** | |
| Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems, Federal Register, Vol. 59, No. 3, January 5, 1994 [Appx., Doc. 11] | 1-7, 10, 11 |
| Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems, Federal Register, Vol. 60, pp. 65243-44, December 19, 1995 [Appx., Doc. 12] | 1-7, 10, 11 |
| **Other – Secondary Sources** | |
| 16B C. Wright, A. Miller, and E. Cooper, Federal Practice & Procedure Juris.2d § 4022 (2008) | 11 |

## ARGUMENT

### I. THE WISCONSIN SUPREME COURT CONSTRUED FEDERAL REGULATIONS WITH NATIONAL APPLICATION.

The State of Wisconsin ("the State") contends there is no federal question because the Supreme Court of Wisconsin was not construing the National Emission Standards For Hazardous Air Pollutants (NESHAP), 40 CFR §61.140, *et. seq.* [Appx., Doc. 5, pp. A-75 to A-100][1] Instead, the State contends the Supreme Court of Wisconsin construed NR 447, Wis. Admin. Code. Significantly, the State concedes that NR 447 is "based on a near identical federal set of administrative rules ...." [State's Br., p. 9] The State belies its own argument when it concedes "the Wisconsin Supreme Court used *EPA's clarifications* ... to construe the meaning of the rule addressing the proper method for measuring the percentage of asbestos in the multi-layer construction material only after finding the rule ambiguous as written." [State's Br., p. 12] [emphasis added]

The rules in NR 447 at issue in this petition are identical to the NESHAP but for non-substantive changes. The provisions of NR 447 that the State asserted Harenda Enterprises, Inc. (hereinafter "HEI") violated are virtually identical to the NESHAP. *Compare* NR 447.08(6) to 40 CFR §61.145(c); *and* NR 447.07 to 40 CFR §61.145(b); *and*

---

[1] The references to "Appx." are to the Appendix to HEI's Petition For Writ of Certiorari filed on September 4, 2008.

NR 447.13(1) to 40 CFR §61.150. [Appx., Doc. 10, pp. A-126 to A-153; Appx., Doc. 5, pp. A-75 to A-100]

The federal issue involves the promulgation and interpretation of the Interim Method, appendix E, subpart E, 40 CFR part 763, section 1.7.2.1, which the State adopted in NR 484.04(28). [Appx., Doc. 9, pp. A-124 to A-125] Also, both the NR 447 regulations and the NESHAP expressly adopt the Interim Method. *See* NR 447.02(1) *and* 40 CFR §61.141. [Appx., *Id.*] One of the major federal issues the lower courts addressed was whether the asbestos test results upon which the State relied satisfied the Interim Method as adopted by 40 CFR §61.141 and NR 447.02(1).

The Interim Method is exclusively a federal regulation applicable in all states, that NR 484.04(28) adopted, and that the Supreme Court of Wisconsin construed. The Supreme Court of Wisconsin construed the Interim Method as interpreted by the federal Environmental Protection Agency (EPA) in the Clarifications.[2] The court recognized that the trial court "determined that the State satisfied its burden of demonstrating that there was ACM under [NR 447] and the relevant [Interim Method]." [Appx., Doc. 1, pp. A-10 to A-11]

---

[2] The first EPA "clarification" is titled "Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems," and is published in the Federal Register, Vol. 59, No. 3, January 5, 1994. [Appx., Doc. 11, pp. A-154 to A-158] The second "clarification" is titled "Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems," and is published in the Federal Register, Vol. 60, pp. 65243-44, December 19, 1995. [Appx., Doc. 12, pp. A-159 to A-165]

It recognized that the Wisconsin Court of Appeals "determined that the State's interpretation of [the Interim Method], which was based upon the clarifications of the rule issued by the [EPA], was inconsistent with the plain language of the [Interim Method]." [Appx., Doc. 1, p. A-11] The Supreme Court of Wisconsin held the Clarifications did not violate the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. §553(b) (APA), citing exclusively federal case law decided under the APA. [Appx., Doc. 1, pp. A-30 to A-33] Accordingly, the State's argument is incorrect as a matter of fact and of law.

Equally incorrect is the State's argument that the Supreme Court of Wisconsin's decision is "exclusively a matter of state law," has only "precedential effect" in Wisconsin, and has "no precedential effect for federal courts." [State's Br., p. 9] While the decision is not binding on other state and federal courts, its decision is considered persuasive, and will certainly be cited as such throughout the nation. *See In re Nolan*, 383 B.R. 391, 396 (6th Cir. 2008); *Deeds v. U.S.*, 306 F.Supp. 348, 359 (D.C.Mont. 1969); *and Hoosier Cas. Co. of Indianapolis, Ind. v. Fox*, 102 F.Supp. 214, 233 (D.C. Ia. 1952).

## II. THE TESTING PROTOCOL ISSUE IS A PART AND PARCEL OF THE *SAN DIEGO GAS* APPEAL.

The State contends "the issue regarding the proper method to be used in evaluating the multi-layered samples for the presence of asbestos, whether it be the evaluation of single layers or an averaging of the layers, is *not* before the [9th Circuit in the *San Diego Gas* case]." [State's Br., p. 11] The State references the Government's brief to the 9th Circuit in *San Diego Gas*, contending it does not include the single versus combined layer testing issue. The State seeks to lodge the Government's 9th Circuit brief in this Court under Rule 32.3.

A review of the 9th Circuit brief shows that the combined layer testing protocol of the Interim Method versus the single layer testing protocol of the Clarifications is a part and parcel of the Government's appeal. In addition to holding that the single layer testing protocol of the Clarifications could not serve as the basis of asbestos liability, the Southern District of California held in *San Diego Gas* that debris pile samples that did not contain all of the layers of the original material were not admissible because such samples violated the requirement in the Interim Method that samples contain all the layers of the original material. While the Government argues in its *San Diego Gas* brief that the Southern District of California erred in holding that debris pile/non-representative samples were not admissible as evidence, a part and parcel of the Government's argument is that, because the single layer testing method of the Clarifications is

permissible, non-representative debris pile samples are likewise permissible.

In the Clarifications, the Government argued, "EPA stated that a material is RACM if any one of its multiple layers, standing alone, contains 1% or more asbestos. The district court found that [the Clarifications] conflicted with the [combined layer testing protocol of the Interim Method] and therefore were not binding. The court found instead that the NESHAP demolition regulations only apply to a multi-layer material if the *average* asbestos content of the material exceeds 1%." [Govt. Br., p. 15] [emphasis original] "By effectively requiring the field personnel to testify that the samples they took contained all layers of the demolished material in precisely the same proportions as the original material," the Government complains, "the court's interpretation would make it difficult, if not impossible, to use debris samples as evidence in an asbestos NESHAP work practices prosecution." [Govt. Br., p. 26] [emphasis original]

The testing protocol issue is a part and parcel of the Government's argument in *San Diego Gas* that the debris pile samples are not required to be representative of the original material.

## III. THE ARGUMENT THAT THIS COURT SHOULD DECLINE TO HEAR THE CASE BECAUSE THE EPA CAN CORRECT ITS OWN RULE WOULD ALLOW AGENCIES TO RUN ROUGHSHOD OVER THE DEMOCRATIC PROCESS.

The State argues "[t]he solution to the confusion caused by the EPA rule as written is the amendment of the rule, not review by this Court." [State's Br., p. 12] The State asserts that "even if this Court would accept review and subsequently rule in favor of Harenda's interpretation of the rule as written, the Court's decision's precedential effect could be quickly cut short by the EPA amending its rule in conformity with [the Clarifications]." [*Id.*]

This argument admits the truth of HEI's, the *San Diego Gas* court's, and the Wisconsin Court of Appeals' thesis that the Clarifications are unenforceable because they are substantively inconsistent with the Interim Method. The admission that the EPA could amend "its rule in conformity with" the Clarifications is antithetical to the State's central thesis that the Clarifications are not inconsistent with the Interim Method. If the State's central thesis that the Clarifications are merely a "guidance" that are consistent with the Interim Method were correct, there would be no need for the EPA to amend the Interim Method "in conformity with" the Clarifications.

Regardless, the State's argument misses the point. It is clear that, given the EPA's position that the Clarifications are consistent with the Interim

Method and that rulemaking is not necessary, the EPA has no intention of amending its rule to bring it "in conformity with" the Clarifications. Neither the EPA nor any other administrative agency will change a rule unless a court tells it to do so. In the second "clarification" dated December 19, 1995, the EPA stated that it "intends to amend the asbestos NESHAP in the near future to refer specifically to [the] procedures [contained in this clarification]." Given that the EPA has not attempted to amend the Interim Method in the 13 years that have ensued, the State's argument is disingenuous.

If there were any validity to the State's argument, then neither this Court nor any other court would accept a case for review of administrative action on an issue of national importance such as asbestos abatement. The court would simply "beg off" cases where the agency failed to observe administrative rulemaking since the agency could simply undertake rulemaking if it so chose. There would be no decisions by this Court or any court finding that an agency failed to properly rule-make, and federal, state and local agencies could run roughshod over the democratic process of notice and opportunity to be heard on substantive agency rules that affect a person's property and liberty interests.

This Court has repeatedly accepted cases for review under Rule 10 where the agency failed to rulemake, and other state and federal courts have passed on such agency failure. *See, e.g., Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002); *MCI*

*Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994); *and Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). It has never been a basis for this Court or any other court to deny review of agency action simply because the agency, at its own caprice and whim, could decide to change or not change the rule at issue. The State's argument is too far-reaching to require further comment.

## IV. ARGUMENT RESPECTING THE SUBSTANCE OF THE REGULATORY INTERPRETATION ISSUE IS PREMATURE.

In Section IV. on pages 13-19 of its brief, the State essentially argues that the decision of the Supreme Court of Wisconsin in this case is the better rule of law because its reasoning is supposedly better than the reasoning of the *San Diego Gas* decision. By arguing that, as between these two diametrically opposing decisions, the Wisconsin decision is the superior one, the State is admitting that there are conflicting decisions on an issue of national importance -- asbestos abatement -- that "has not been, but should be, settled by this Court" within the meaning of Rule 10(c). It is further admitting that there are conflicting decisions that this Court should resolve under Rule 10(b).

Far from constituting a basis for this Court to deny certiorari, the State's argument actually supports issuance of the writ. By arguing the

substance of the case on a petition for a writ of certiorari, the State is getting ahead of itself. The issue in this petition is whether this Court should accept the case under the criteria set forth in Rule 10, not who should prevail on the substance if the Court does issue the writ. While HEI could provide ample reasons why the *San Diego Gas* decision is the better rule of law, it will not make that argument here, because it is premature.

## V. ARGUMENT RESPECTING THE SUBSTANCE OF THE DUE PROCESS ISSUE IS PREMATURE.

The State misses the point when it argues that the Supreme Court of Wisconsin did not violate HEI's substantive due process rights when it arbitrarily accepted the State's positive test results and capriciously rejected HEI's negative test results without a rational basis for its holding. The issue at this stage is whether, given the national importance of the rules for asbestos abatement liability, this Court should accept this case for review to determine whether substantive due process requires a court to have a rational basis for whose test results to accept where, as here, there are dueling test results. That is, where the State's test results are positive for asbestos and the defendant's test results are negative for asbestos.

As pointed out in HEI's petition, the decision on this issue has significant importance for asbestos abatement on a national basis. As also pointed out in HEI's petition, the resolution of the issue whether any one positive "hit" for asbestos in testing by the

government is sufficient to establish liability where, as here, there are conflicting test results with no concomitant showing that the defendant's test results fail to comply with the NESHAP will have significant impact on asbestos abatement nationally. The State's attempt to argue the substantive issue concerning whether the Supreme Court of Wisconsin's decision actually constitutes a due process violation is premature.

## VI. HEI DID NOT WAIVE THE ARGUMENT CONCERNING REPRESENTATIVE SAMPLING.

In its petition, HEI argued that this Court should grant certiorari, because the decision of the Supreme Court of Wisconsin in this case effectively wrote the representative sample requirement out of the Interim Method. The basis of this argument is that 1.7.2.1 through 1.7.2.4 of the Interim Method and Reference 5 require that, in addition to requiring that the investigator *test* all layers of material and combine the results, the investigator is required to *sample* all of the layers. In this case, the State admitted that applicable sampling regulations require the sampler to attempt to obtain all layers when taking wall samples. [R.44:72; R.44:141] The State contends that HEI waived this argument, because it supposedly raised it for the first time on appeal.

The State's argument is inconsistent with both the law and the facts. HEI's argument that the Clarifications violate the Interim Method because they write the representative sampling regulations

out of the Interim Method is a part and parcel of HEI's argument that the Clarifications violate the Interim Method because they allow single layer testing. Clearly, if the single layer testing of the Clarifications violates the Interim Method's requirement of combined layer testing, they likewise violate the Interim Method requirement that the samples be representative of all layers of the original material. Each argument has as its common thread that the single layer testing protocol of the Clarifications are inconsistent with, and are a substantive change to, the Interim Method. The arguments are "one in the same."

If these two arguments are not identical, they are at the very least closely related. Existing precedent provides that the Court may consider an argument that the petitioner may not have made in the lower court if the argument is "closely related" to an argument that the petitioner did make in the lower court. *See, e.g.*, 16B C. Wright, A. Miller, and E. Cooper, *Federal Practice & Procedure Juris.2d* § 4022 (2008), *citing Lear, Inc. v. Adkins*, 395 U.S. 653, 662 n. 10, 89 S.Ct. 1902, 1906-1907 n. 10, 23 L.Ed.2d 610 (1969); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 444 n. 3, 89 S.Ct. 601, 603 n. 3, 21 L.Ed.2d 658 (1969). A logical culmination of these various cases may be found in the more recent effort to distinguish between arguments and claims, finding it proper to allow new arguments to be presented to the Court so long as the underlying claim was presented to the state courts. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 534, 112 S.Ct. 1522, 1532, 118 L.Ed.2d 153 (1992).

This Court has held that an argument that was made for the first time on a motion for reconsideration in the lower court could be heard even though the lower tribunal denied the motion without opinion. *U.S. v. Great Northern Ry. Co.*, 343 U.S. 562, 568 n. 3, 72 S.Ct. 985, 990, 96 L.Ed. 1142 (1952). *See also Yee*, 503 U.S. at 534, 112 S. Ct. at 1532, 118 L.Ed.2d 153 (holding that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below"); *and Boynton v. Com. of Va.*, 364 U.S. 454, 456-457, 81 S.Ct. 182, 184, 5 L.Ed. 2d 206 (1960) (holding that all arguments closely related to plaintiff's principal discrimination claim could be heard even though not made in the court below). HEI did not waive any arguments that it seeks to have reviewed in this petition.

## CONCLUSION

As indicated in HEI's petition, the national cost of asbestos abatement, and the undisputed increased cost asbestos abatement that will result from the Wisconsin Supreme Court's decision warrants that this Court grant certiorari and settle the federal issues involved.

Mark W. Rattan
Counsel of Record for Petitioner
Litchfield Cavo, LLP
13400 Bishops Lane, Suite 290
Brookfield, WI 53005-6237
(262) 784-8966